(15)

No. 91-810-CFX
Status: GRANTED

Title: City of Burlington, Petitioner
v.
Ernest Dague, Sr., et al.

Docketed:
November 18, 1991

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Clapp,Michael B.

Counsel for respondent: Pearson,William W.

Ptn mailed Nov. 18 and recd Nov. 19, 1991

Entry	Date	Note	Proceedings and Orders
1	Nov 18 1991	G	Petition for writ of certiorari filed.
2	Nov 18 1991		Appendix of petitioner filed.
3	Dec 19 1991		Brief of respondent Ernest Dague, et al. in opposition filed.
4	Dec 31 1991		DISTRIBUTED. January 17, 1992
6	Jan 21 1992		REDISTRIBUTED. January 24, 1992
7	Jan 27 1992		Petition GRANTED. limited to the following question: May a court, in determining a reasonable attorney's fee award under Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. Section 6972(e), or Section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all? **********
8	Feb 7 1992	*	Record filed. Partial proceedings and briefs U.S. Court of Appeals, Second Circuit (1 BOX)
9	Feb 18 1992	*	Record filed. Original record U.S. District Court, District of Vermont(1 Box)
10	Mar 4 1992		SET FOR ARGUMENT TUESDAY, APRIL 21, 1992. (3RD CASE).
14	Mar 10 1992		Brief amici curiae of District of Columbia, et al. filed.
11	Mar 12 1992		Brief amicus curiae of United States filed.
12	Mar 12 1992		Brief amici curiae of Washington Legal Foundation, et al. filed.
13	Mar 12 1992		Brief of petitioner Burlington filed.
15	Mar 18 1992		CIRCULATED.
16	Mar 26 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
17	Mar 27 1992	D	Motion of respondents for divided argument to permit American Bar Association to participate in oral argument as amicus curiae filed.
18	Apr 6 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	Apr 6 1992		Motion of respondents for divided argument to permit

2 pp

No. 91-810-CFX

Entry	Date	Note	Proceedings and Orders
			American Bar Association to participate in oral argument as amicus curiae DENIED.
20	Apr 13 1992		LODGING by respondents.
21	Apr 13 1992	X	Brief amici curiae of Lawyers Committee for Civil Rights Under Law,et al. filed.
22	Apr 13 1992	X	Brief amicus curiae of American Bar Association filed.
23	Apr 13 1992	X	Brief of respondents Dague, Ernest, et al. filed.
24	Apr 13 1992	X	Brief amici curiae of Alabama Employment Lawyers Association, et al. filed.
25	Apr 17 1992	X	Reply brief of petitioner Burlington filed.
26	Apr 21 1992		ARGUED.

91-810

Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX, VOLUME I, PAGES 1-117

ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
Burlington, Vermont
Of Counsel

MICHAEL B. CLAPP
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, VT 05402-0998
(802) 864-5751

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the failure of environmental citizen suit plaintiffs to comply strictly with statutory pre-suit notice and delay requirements applicable to their actions require dismissal on either jurisdictional or procedural grounds?

II. May a district court in a citizen suit action award a fully compensatory and enhanced attorney's fee where a citizen suit plaintiff obtains no relief or nominal relief?

III. Does §1311(a) of the Clean Water Act regulate the passage of previously polluted water through a discernable, confined and discrete conveyance?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF CASE 2

REASONS FOR GRANTING CERTIORARI 13

I. THE CIRCUIT COURTS ARE IN HOPELESS DISARRAY ON THE ISSUE OF HOW THE NOTICE AND DELAY REQUIREMENTS COMMON TO FEDERAL ENVIRONMENTAL CITIZEN SUIT ACTIONS ARE TO BE APPLIED BY THE FEDERAL COURTS. THE OPINION OF THIS COURT IN *HALLSTROM V. TILLAMOOK COUNTY*, DESIGNED TO BRING ORDER AND UNIFORMITY TO THIS ISSUE, HAS BEEN SO LIMITED BY THE SECOND CIRCUIT IN THIS CASE AS TO RENDER THAT DECISION USELESS AS A MEANS OF RESOLVING THE CONFLICT... 14

II. THE OPINION IN THIS CASE DEMONSTRATES AND REFLECTS CONTINUED CONFUSION AND INCONSISTENCY AMONG THE FEDERAL COURTS RESPECTING THE APPLICATION OF FEE-SHIFTING STATUTES UNDER FEDERAL LAW, BOTH AS TO WHEN A FEE AWARD CAN BE ORDERED AND AS TO THE LIMITS OF A COURT'S DISCRETION IN DETERMINING THE AMOUNT OF FEE AWARD 21

TABLE OF CONTENTS – Continued

Page

III. THE DECISION IN THIS CASE CREATES A SPLIT AMONG THE CIRCUIT COURTS REGARDING THE SCOPE OF THE REGULATORY SCHEME ADOPTED BY CONGRESS IN THE CLEAN WATER ACT..... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Cheng Fan Kwok v. INS, 392 U.S. 206 (1968) 18

City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976)..... 14

Coleman v. Turner, 838 F.2d 1004 (8th Cir. 1988)..... 24

Estate of Farrar v. Cain and Hobby, 941 F.2d 1311 (5th Cir. 1991).....13, 24

Flast v. Cohen, 392 U.S. 83 (1968)..... 17

Garcia v. Cecos Intern., Inc., 761 F.2d 76 (1st Cir. 1985)..... 14

Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536 (11th Cir. 1987) 24

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 17

Hallstrom v. Tillamook County, 493 U.S. 20 (1989) ....*passim*

Healy v. Ratta, 292 U.S. 263 (1934)..... 18

Hensley v. Eckerhart, 401 U.S. 424 (1982)..... 13, 24, 25

Hewitt v. Helms, 482 U.S. 755 (1987)..... 13, 22, 23, 24

Lattimore v. Oman Construction, 868 F.2d 437, *reh. denied*, 875 F.2d 874 (11th Cir. 1989)..... 26

Lockerby v. Phillips, 319 U.S. 182 (1943)..... 18

McKenzie v. Kennickell, 875 F.2d 330, *reh. denied*, 884 F.2d 1405 (D.C. Cir. 1989)..... 26

National Environmental Foundation v. ABC Rail Corp., 926 F.2d 1096 (11th Cir. 1991) 9, 16

TABLE OF AUTHORITIES – Continued

Page

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988).....27, 29

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982)..... 29

Nephew v. City of Aurora, 830 F.2d 1547 (11th Cir. 1987), *cert. denied*, 485 U.S. 976 (1988)..... 24

Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546 (1986)..... 22

Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711 (1987)..... 26

Proffitt v. Commissioners, Township of Bristol, 754 F.2d 504 (3d Cir. 1985)..... 15

Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton, 644 F.2d 995 (3d Cir. 1981) 15

Rhodes v. Stewart, 488 U.S. 1 (1988).....13, 23, 24

Rode v. Dellarciprete, 892 F.2d 1177 (3d Cir. 1990) 26

Romero v. International Terminal Operating Company, 358 U.S. 354 (1959) 18

Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991) 24

Save Our Cumberland Mountains Inc. v. Hodel, 826 F.2d 43 (1987), *vacated in part en banc*, 857 F.2d 1516 (D.C. Cir. 1988) 26

Scofield v. City of Hillsborough, 862 F.2d 759 (9th Cir. 1988) 24

Sierra Club v. Morton, 405 U.S. 727 (1972) 18

Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991) 16

TABLE OF AUTHORITIES – Continued

Page

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), *cert. denied sub nom. Fayetteville v. Spell*, 484 U.S. 1027 (1988) 26

State of Missouri ex rel Ashcroft v. Dept. of the Army, 672 F.2d 1297 (8th Cir. 1982) 29

Student Public Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988) 26

Texas State Teachers Association v. Garland, 489 U.S. 782 (1989) 13, 23

U.S. ex rel TVA v. Tennessee Water Quality Control Board, 717 F.2d 992 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) 29

Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985) 14

Whitmore v. Arkansas, 495 U.S. 149 (1990) 17

CONSTITUTION

United States Constitution, Article I, Section 1 2

United States Constitution, Article III, Section 1 2

United States Constitution, Article III, Section 2 2

STATUTES

33 U.S.C. §1311 ..... 2, 6, 7, 12, 28

33 U.S.C. §1316 ..... 9, 28

33 U.S.C. §1317 ..... 2, 5, 6, 9, 10, 28

33 U.S.C. §1342 ..... 2, 6, 28

33 U.S.C. §1362 ..... 2, 28

TABLE OF AUTHORITIES – Continued

Page

33 U.S.C. §1365 ..... 2, 4, 5, 9, 11

42 U.S.C. §1988 22

42 U.S.C. §6925 ..... 2, 4, 6, 10

42 U.S.C. §6926 ..... 2, 7, 10, 11

42 U.S.C. §6928 2

42 U.S.C. §6930 ..... 2, 4, 6, 10

42 U.S.C. §6945 ..... 2, 6, 7, 11

42 U.S.C. §6972 ..... *passim*

No. _____

In The

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October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

The City of Burlington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-37) is reported at 935 F.2d 1343. The opinion of the district court dated October 16, 1989 (App. 59-115) is reported at 732 F.Supp. 458. The opinion of the district court dated March 15, 1990 (App. 118-129) is reported at 733 F.Supp. 23. The balance of the court of appeals and district court opinions

and orders (App. 38-58, 116-117, 130-146) are not reported.

JURISDICTION

The opinion of the court of appeals was entered on June 12, 1991. A timely motion for reargument was denied on August 20, 1991. (App. 145). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are set out verbatim in the Appendix:

United States Constitution

Article I, Section 1
Article III, Section 1
Article III, Section 2

Sections 301(a), 307, 402, 502, and 505 of the Clean Water Act (33 U.S.C. §§1311(a), 1317, 1342, 1362, and 1365).

Sections 3002, 3005, 3006, 3008, 3010, 4005 and 7002 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§6922, 6925, 6926, 6928, 6930, 6945, and 6972).

STATEMENT OF CASE

Starting in the 1950's and continuing until January 1, 1990, the petitioner, the City of Burlington, Vermont, ("City") operated a municipal landfill adjacent to a wetland known as the Intervale. The Intervale is bisected by a railroad embankment. Running through the railroad embankment is a large stone culvert which connects the marsh on either side of the embankment. Depending

upon conditions, the waters of the marsh may flow in either direction through the culvert, but the usual flow pattern is from south to north. The culvert is separated from the landfill mass itself by the waters of the marsh lying south of the railroad embankment, known as the Beaver Pond.

Leachate is generated within the landfill. Although the leachate produced in the landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA, the concentrations of those chemicals and compounds do not exceed state or federal prohibitions. Tests performed on samples of pure leachate taken from the landfill indicate that it is toxic to a small fish called the fathead minnow, daphnia (water fleas) and algae.

Because the landfill is unlined, some of the leachate escapes the collection system by entering the upper gradients, or "flow tubes", of groundwater under the landfill. The groundwater flows north beyond the landfill boundary, and the flow tubes of the leachate-contaminated groundwater all surface in the Intervale, north of and within 300 feet of the railroad embankment. Until late in 1985, leachate would also occasionally emerge from the sides of the landfill via seeps. From there it would flow into the Beaver Pond. Any pollutants from the landfill which might enter the waters of the marsh have already done so before those waters flow through the culvert.

In the early 1980's the State of Vermont began to scrutinize the landfill closely. In January of 1981 the City and the state entered into an Assurance of Discontinuance, which was subsequently amended on January 31, 1985 to provide *inter alia:* (1) for possible operation of the

landfill until January 1, 1990; and (2) a requirement that the City install a leachate collection system by September 1, 1985, and a methane control system by December 1, 1985. This amended assurance was entered as an order of the state court, pursuant to Vermont's Administrative Procedure Act, on March 7, 1985.

Engineering plans for the leachate and methane systems were approved by the state in August, 1985. On September 5, 1985, the City advertised for bids for the construction of the systems. On November 11, 1985, the City entered into a contract for the construction of the systems, which commenced shortly thereafter. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers. The leachate collection system, though not yet complete, began operations on January 15, 1986. By March 25, 1986, both systems had been completely installed and were operational, as designed.

Plaintiffs filed their ten-count complaint and a motion for a preliminary injunction on October 9, 1985, at 10:00 a.m. Both the complaint and the motion for a preliminary injunction sought immediate closure of the landfill among other extensive injunctive relief. The complaint included *inter alia:* in Counts I and II, a citizen suit action pursuant to 42 U.S.C. §6972(a)(1)(A) alleging violations by the City of 42 U.S.C. §6925 and §6930; in Count III, a citizen suit action pursuant to 42 U.S.C. §6972(a)(1)(B) alleging that because of the violations alleged in Counts I and II, the landfill may present an imminent and substantial endangerment to health or the environment; in Count IV, a citizen suit action pursuant to 33 U.S.C. §1365 and in Counts V through X, actions based on alleged violations of state law. Federal jurisdiction was alleged to exist with respect to Counts I through III pursuant to 42 U.S.C. §6972 and with respect to Count IV pursuant to 33 U.S.C.

§1365.[1] While the complaint invoked those statutes as a basis for jurisdiction, it did not allege that plaintiffs had given the pre-suit notice to the EPA administrator, the state and the City, which those statutes require, nor did it allege that applicable delay periods had been observed. Instead, the complaint merely alleged with respect to each count that since each of the entities had actual or constructive knowledge of the violations alleged, further notice by plaintiffs would be meaningless.[2]

Defendant filed a motion to dismiss for lack of jurisdiction based upon the failure of the plaintiffs to comply with the notice and delay requirements applicable to their actions.[3] The magistrate, to whom the case had been assigned, reserved decision on the motion to dismiss after ordering plaintiffs to file a "proper notice",[4] *see* docket

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[1] Pendent jurisdiction was alleged with respect to Counts V through X.

[2] See paragraphs 59, 72, 81 and 86 of plaintiffs' complaint, App. 244.

[3] The motion to dismiss was based on two grounds: (1) that the plaintiffs had failed to give actual notice, as required, to the City, the state and the EPA administrator before commencing their actions, and (2) even if notice could be deemed to have been given by the filing of the complaint, the plaintiffs could not qualify for exceptions to the delay requirements: (a) with respect to their RCRA actions, because, as a matter of law, no action could be maintained for a violation of any provisions of subchapter III since those provisions had all been superseded by Vermont's approved hazardous waste program; or (b) with respect to the CWA action because, despite plaintiffs' allegation of violations of 33 U.S.C. §1317, only actions respecting violations of §1317(a) triggered the exception to the delay period and that section of the statute imposed obligations only on the EPA administrator, not the City.

[4] Thereafter, on November 5, 1985, plaintiffs' attorney filed an affidavit (App. 270) indicating that on October 8, the

(Continued on following page)

entry of October 28, 1985 (App. 140), and proceeded with hearings on plaintiffs' motion for a preliminary injunction.

The court subsequently denied both the original motion to dismiss and several reassertions thereof advanced by the City throughout the period of time that these citizen suit actions were pending before the district court.

On March 26, 1986, the court issued an order (App. 40) denying the motion for a preliminary injunction, but ordering the City to install the leachate and methane systems within 60 days. As previously indicated, *supra* at 4, the City had already accomplished what the court ordered before the order issued.[5]

After a trial by court with respect to Counts I through V[6] of the complaint on October 16, 1989, the district court issued its opinion and order providing:

(Continued from previous page)

day before the complaint was filed, he had placed first class letters (see copy at App. 273) in the mail addressed to the City, the state, and the EPA Administrator notifying those parties of alleged violations of 42 U.S.C. §6925, §6930 and §6945, and violations of 33 U.S.C. §1311, §1317, and §1342. Attached to the affidavit was a letter dated November 5, 1985 (see copy at App. 275) purporting to be the supplemental notice ordered by the magistrate. The "supplemental notice" only refers to those statutory violations listed in the October 8, 1985 letter. At no time have plaintiffs averred or offered proof that the October 8 letters were delivered before their complaint was filed. Likewise, the plaintiffs have at no time averred or offered proof that they notified the City, the state or the EPA of a claimed "endangerment" as required in connection with their 42 U.S.C. §6972(a)(1)(B) action.

[5] The court of appeals decision erroneously states that the leachate and methane systems were not installed until after the March 26, 1986 order, *see* App. 8 and 20, but *see* District Court Opinion of October 16, 1989 (App. 59 at 75) and Affidavit of Steven Goodkind (App. 277).

[6] Count V alleges violation of Vermont's Groundwater Protection Act.

(1) With respect to Count I, that plaintiffs' allegations of RCRA subchapter III violations were not actionable because, pursuant to 42 U.S.C. §6926(b), Vermont's approved hazardous waste plan operated in lieu of and superseded the prohibitions contained in subchapter III;

(2) With respect to Count II, that the City had violated 42 U.S.C. §6945 by (a) generating methane gas in violation of regulations issued pursuant to subchapter IV of RCRA, but had abated that practice on or about December 27, 1985[7] and since then had not violated that provision; and (b) because it found the City in violation of Clean Water Act prohibitions, as alleged in the CWA citizen suit action, that the City was, *ipso facto*, in violation of subchapter IV RCRA provisions;

(3) With respect to Count III, that the landfill may present an imminent and substantial endangerment to health or the environment;[8] however, the court did not identify any specific endangerment or explain why whatever it perceived the endangerment to be was imminent and substantial.

(4) With respect to Count IV, the court held that the City had violated 33 U.S.C. §1311(a) of the Clean Water

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[7] December 27, 1985 is the date on which the methane control system became operative.

[8] The court of appeals erroneously states that the district court found the City to be in violation of subchapter III and subchapter IV as the result of the district court's finding that the landfill presented an imminent and substantial endangerment. (App. 9) In fact, the court did not find the City to have been in violation of subchapter III of RCRA but, as previously indicated, found the provisions of subchapter III to be inapplicable to the City.

Act by discharging pollutants from a point source (the railroad culvert) into the Intervale without a permit;

(5) As to Count V, the court found the City to be in violation of Vermont's Groundwater Protection Act.

The order required the City to close the landfill by January 1, 1990, the same closing date required by the March 7, 1985 state court order, but did not grant any of the relief sought by the plaintiffs in their action. The court further found, without a hearing on the subject, that the plaintiffs were prevailing parties entitled to attorney's fees to be determined.

Thereafter, the City renewed its motion to dismiss for lack of jurisdiction, which the court denied. (See order of March 15, 1990, App. 118). The court then proceeded to enter judgment pursuant to its order of October 16, 1989, awarding plaintiffs' attorney's fees in the fully compensatory amount of $198,027.50 plus a 25% risk/contingency enhancement of $49,506.87. The court also awarded plaintiffs $10,929.66 in expenses, including expert fees.

On appeal, the Second Circuit affirmed the decisions of the trial court in all respects:

(1) It upheld the jurisdiction of the lower court, holding that plaintiffs had adequately complied with the notice and delay requirements applicable to their citizen suit actions.

Each of plaintiffs' three citizen suit actions is subject to differing notice and delay requirements. Commencement of plaintiffs' 42 U.S.C. §6972(a)(1)(A) action is prohibited by the provisions of §6972(b)(1)(A) prior to 60 days after plaintiffs give notice of violations to the EPA administrator, the state and the City, except that actions

respecting a violation of subchapter III[9] may be brought immediately after notice is given. The 42 U.S.C. §6972(a)(1)(B) action is, by the terms of §6972(b)(2)(A), prohibited until after notice of the endangerment[10] is given and a 90 day delay period is observed, except no delay is required if the action respects a subchapter III violation. The 33 U.S.C. §1365(a) action is prohibited by §1365(b) unless plaintiffs give 60 days prior notice of the violations alleged. The delay period is waived if the action is one respecting a violation of §1316 and §1317(a).[11]

The Second Circuit opinion employs a discretionary, pragmatic approach to the application of these notice and delay requirements. Holding that this case "involves hazardous wastes," the court declared that "rigid adherence" to the notice and delay requirements "would lean too far, for it would circumvent congress's [sic] intent in enacting these statutes." (App. 16). Having determined not to

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[9] Subchapter III of RCRA is found at 42 U.S.C. §§6921 through 6934.

[10] The Second Circuit opinion either overlooks or ignores the requirement of §6972(b)(2)(A) that plaintiffs give pre-suit notice of the alleged endangerment upon which their §6972(a)(1)(B) action is based. *See* Second Circuit opinion (App. 12) where the court erroneously states: "Section 6972(b)(2), which applies to actions brought pursuant to subsection B of §6972(a)(1), provides for a 90-day delay, but is similar to §6972(b)(1) in all other respects." *Contrast*, Opinion and Order of District Court, March 15, 1990, App. 118, 124-128.

[11] Plaintiffs did not plead a violation of §1316. Section 1317(a) does not impose obligations on the City and, therefore, an allegation of its violation is insufficient to trigger the exception to the delay period. *See* Second Circuit Opinion, App. 20-21; *accord National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1098 (11th Cir. 1991).

apply the notice and delay requirements strictly, the court proceeded to analyze whether plaintiffs adequately complied with the requirements with respect to Count I (the plaintiffs' §6972(a)(1)(A) action alleging violations of §6925 and §6930). Exercising discretion, the court held that the mailing of the October 8, 1985 letter, even though there was no evidence of delivery before suit was commenced, was sufficient to comply with the notice requirement (App. 12). It also concluded that the mere allegation of subchapter III violations in Count I was sufficient to trigger the exception to the delay requirement, even though the allegation was determined to be non-actionable because subchapter III was, pursuant to 42 U.S.C. §6926(b), superseded by Vermont's approved hazardous waste program.[12], [13]

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[12] RCRA provides for approval of qualified state hazardous waste programs by the EPA administrator and dictates that a state having such an approved program "is authorized to carry out such program in lieu of the federal program under this subchapter." 42 U.S.C. §6926(b). The district court determined that Vermont has, as of January, 1985, an approved hazardous waste program which operates in lieu of the federal program; that the regulatory requirements under RCRA are superseded by the state regulations; and that a plaintiff seeking to challenge the operation of a hazardous waste site must bring their action under state, not federal, law. (App. 71).

[13] It is difficult, if not impossible, to reconcile the court of appeals' holding that an allegation of a violation of subchapter III, which is not applicable to the City because it has been superceded, is sufficient to trigger the exception to the RCRA delay period with its holding that an allegation of a violation of §1317(a) is insufficient to trigger the exception to the CWA delay period because that section is not applicable to the City. (*See* Second Circuit opinion, App. 20-21).

Having thus established that jurisdiction existed with respect to Count I, the court employed a "hybrid complaint" theory to pragmatically waive the notice and delay requirements applicable to the remainder of the plaintiffs' citizen suit actions. Thus, it waived the delay requirement applicable to plaintiffs' §6972(a)(1)(A) action based upon alleged violations of 42 U.S.C. §6945 (Count II), it waived the notice and delay requirement applicable to the Count III, 42 U.S.C. §6972(a)(1)(B) action,[14] and it waived the delay requirement applicable to the Count IV, 33 U.S.C. §1365(a) action.

In upholding jurisdiction over Count I of the complaint, the court of appeals also impliedly extended the jurisdictional grant contained in §6972 with respect to §6972(a)(1)(A) actions. The statute only grants the district court jurisdiction "to enforce the permit, standard, regulation, condition, requirement, prohibition or order referred to in paragraph (1)(A)." Paragraph (1)(A) refers to "any permit, standard, regulation, condition, requirement, prohibition, or order *which has become effective pursuant to this chapter*" (emphasis added). Since subchapter III was found not effective[15] it would appear that §6926(a) jurisdiction would not extend to Count I of the complaint.

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[14] There is not even a pretense in this case that plaintiffs gave notice of an "endangerment" as required by §6972(b)(2)(A). Neither the letter notice of October 8, 1985 (App. 273) nor the "supplemental notice" (App. 275) mention or refer to an endangerment or a violation of §6972(a)(1)(B). The Second Circuit either considered this omission a "technicality" (App. 21), or misread the applicable statutory requirements, *see* footnote 10 *supra*.

[15] See district court opinion of October 16, 1989 (App. 59).

(2) It upheld the award of enhanced attorney's fees, holding that the lower court's declaration that violations of the statutes had occurred constituted a change in the legal relationship of the parties entitling plaintiffs to prevailing party status.[16]

(3) Despite its acknowledgement that "any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert," (App. 22) the court of appeals upheld the trial court determination that the City was violating §1311(a) of the Clean Water Act.

(4) The circuit court denied the City's challenge that there was insufficient evidence to support the lower court's conclusion that the landfill presented an imminent and substantial endangerment. It did so by determining to give no meaning to the words "imminent" and "substantial" and reading the statute as authorizing judicial intervention to eliminate *any* risk posed by toxic wastes.

REASONS FOR GRANTING CERTIORARI

Review should be granted because the court of appeals' decision, departing from established principles, expands the jurisdiction of the district court beyond that granted by Congress by failing to construe and apply strictly the notice and delay requirements applicable to plaintiffs' citizen suit actions. In so doing, the Second Circuit joins the circuits among which there is a split of

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[16] The court of appeals also speculated that, but for the district court order, the City would not have complied with the state court order to close the landfill by January 1, 1990.

opinion as to whether the notice and delay requirements are jurisdictional. The discretionary and pragmatic application by the Second Circuit of the mandatory notice and delay requirements also conflicts with this Court's recent decision in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

The opinion incorrectly concludes that plaintiffs, who obtained no relief as a result of their lawsuit, were prevailing parties entitled to fully compensatory and enhanced attorney's fees and expenses. By so holding, the circuit court's opinion conflicts with applicable decisions of this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). To the extent that it can be said that plaintiffs obtained relief, such relief was nominal at best. By awarding attorney's fees where only nominal relief has been granted, the court of appeals' decision conflicts with the Fifth Circuit's holding in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991).

The Second Circuit's failure to reduce the lodestar amount in this case, where plaintiffs obtained only limited success at best, ignores this Court's instruction in *Hensley v. Eckerhart*, 401 U.S. 424 (1982). Further, the grant of enhanced attorney's fees both conflicts with *Hensley, supra* (limiting enhancement to instances of exceptional results), and, to the extent that the court applied a contingency/risk analysis based upon the risk associated with this case, as opposed to an analysis of the market treatment of contingent fee cases as a class, its opinion creates a conflict with the holdings of the Third, Fourth, Eleventh and District of Columbia Circuits with respect to the circumstances in which enhanced fees may be awarded.

Finally, the court's opinion invokes an interpretation of the Clean Water Act which is contrary to the plain language of the Act and is in conflict with the holdings of the Sixth, Eighth and District of Columbia Circuits.

I. THE CIRCUIT COURTS ARE IN HOPELESS DISARRAY ON THE ISSUE OF HOW THE NOTICE AND DELAY REQUIREMENTS COMMON TO FEDERAL ENVIRONMENTAL CITIZEN SUIT ACTIONS ARE TO BE APPLIED BY THE FEDERAL COURTS. THE OPINION OF THIS COURT IN *HALLSTROM V. TILLAMOOK COUNTY*, DESIGNED TO BRING ORDER AND UNIFORMITY TO THIS ISSUE, HAS BEEN SO LIMITED BY THE SECOND CIRCUIT IN THIS CASE AS TO RENDER THAT DECISION USELESS AS A MEANS OF RESOLVING THE CONFLICT.

A. Jurisprudential Background.

The Second Circuit's discretionary and pragmatic application of the notice and delay requirements in this case is not new. Since enactment of the environmental citizen suit statutes, the construction and application of the notice and delay requirements common to those actions have troubled the courts. By 1989 a clear split had developed among the Circuit Courts. The First,[17] Sixth,[18] Seventh[19] and Ninth[20] Circuits had held that the notice

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[17] *Garcia v. Cecos Intern., Inc.*, 761 F.2d 76 (1st Cir. 1985).

[18] *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985).

[19] *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

[20] *Hallstrom v. Tillamook County*, 844 F.2d 598 (9th Cir. 1987).

and delay requirements were jurisdictional in nature. Those circuits, applying traditional principles with respect to the construction and application of jurisdictional statutes, held that a failure of the plaintiff to strictly comply with the notice and delay requirements mandated dismissal of their actions. The Third Circuit,[21] on the other hand, determined that the notice and delay requirements were merely procedural in nature, and could be applied with discretion and pragmatism. It concluded, therefore, that a plaintiff's failure to comply with the requirements does not require dismissal of their actions.

In the midst of this discord among the circuits, this Court issued its opinion in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). Without deciding whether the requirements of notice and delay were jurisdictional, but specifically upholding the principles of strict construction of and strict adherence to the notice and delay requirements, the Court issued a clear mandate, holding that:

> The notice and . . . delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizens suit provisions; a District Court may not disregard these requirements at its discretion.

Id. at 31. Rejecting the pragmatic approach the *Hallstrom* decision further held:

> Where a party suing under the citizens suit provisions of RCRA fails to meet the notice and 60 day delay requirements of 6972(b), the district

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[21] *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 644 F.2d 995 (3d Cir. 1981); *accord Proffitt v. Commissioners, Township of Bristol*, 754 F.2d 504 (3d Cir. 1985).

court must dismiss the action as barred by the terms of the statute.

Id. at 33.

Given the clear, strong language utilized by the Court – especially in light of the Court's recognition that notice and delay provisions are common to citizen suit statutes, *id.* at 23, and its announcement that after the decision in *Hallstrom* "courts will have no need to make case by case determinations of when or whether failure to fulfill the notice requirement is fatal to the party's suit," *id.* at 32 – it might reasonably by concluded that the Court had effectively resolved the dispute among the Circuits as to whether the notice and delay requirements must be strictly construed and applied. Nevertheless, both the District Court and the Second Circuit in this case, holding that *Hallstrom* was limited to RCRA actions brought before the 1984 amendments, have proceeded to apply the notice and delay requirements in an expansively pragmatic manner. Meanwhile, the Fifth Circuit, in a post-*Hallstrom* RCRA decision, concluded that the notice and delay requirements are mandatory, per *Hallstrom*, but not jurisdictional. *Sierra Club v. Yeutter*, 926 F.2d 429, 437 (5th Cir. 1991). The Eleventh Circuit, in reliance on *Hallstrom*, has required strict adherence to Clean Water Act citizens suit notice and delay requirements. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1099 (11th Cir. 1991).

Since *Hallstrom*, therefore, the strict adherence versus pragmatic approach conflict continues to divide the circuits. In addition, a split has developed between the circuits respecting the scope of the *Hallstrom* decision itself, with the Fifth and Eleventh Circuits recognizing that the *Hallstrom* mandate applies to citizens suit actions

generally and requires a strict application of the notice and delay requirements, while the Second Circuit views *Hallstrom* as being severely limited and allowing a continued application of the pragmatic approach to the notice and delay requirements in actions other than those involving the pre-1984 amendment RCRA provisions.

B. The Notice and Delay Requirements are Jurisdictional and Must Be Strictly Construed and Applied.

The citizen suit statutes "could not be clearer", *Hallstrom*, 493 U.S. at 26, in their prohibition of commencement of actions until after the notice and delay requirements are met by a plaintiff. The issue of whether those requirements are jurisdictional should be easily resolved – they are jurisdictional because compliance with the requirements is what distinguishes citizens who have standing to sue from those who do not.[22] Standing is an essential element of jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (a plaintiff must be "a proper party to request an adjudication"). It must be established in every case. *Whitmore v. Arkansas*, 495 U.S. 149, ___, 109 L.Ed.2d 135, 144, 145 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing"). While the issue of standing usually arises in the context of the case or controversy limitations of Article III of the Constitution,

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[22] For a discussion of a similar jurisdictional issue to that raised by this case, *see, Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 67 (1987) (Scalia, J. concurring).

the question is no less important where standing is statutorily controlled by Congress, *see e.g. Sierra Club v. Morton*, 405 U.S. 727 (1972) (federal court had no jurisdiction where plaintiff had no standing to appeal under Administrative Procedure Act).

District courts are congressionally created inferior federal courts under Article III of the Constitution. The legislative power, reserved to Congress by Article I of the Constitution, to ordain and establish inferior courts "includes the power of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerby v. Phillips*, 319 U.S. 182, 187 (1943). Especially where a jurisdictional statute is involved, basic concepts within the separation of powers doctrine require that the judicial branch construe and apply the statute strictly with a view to limiting the exercise of jurisdiction to those cases clearly authorized by Congress. Thus, this Court has repeatedly held that jurisdictional statutes are to be strictly construed. *See, e.g. Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968) (jurisdictional statutes must be construed "with precision and fidelity to the terms by which Congress has expressed its wishes"); *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (strict and limiting construction required regarding statutory restrictions on amount in controversy); *Romero v. International Terminal Operating Company*, 358 U.S. 354, 357 (1959) (Supreme Court has a "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes").

C. *Hallstrom v. Tillamook County* appears to have been inappropriately limited by the Second Circuit.

The decision of this Court in *Hallstrom v. Tillamook County* would appear, on its face, to control the notice and delay issues extant in this case and require its dismissal. Viewed as strict procedural requirements, plaintiffs did not comply with either the notice or delay requirements applicable to their citizen suit actions. (See discussion regarding compliance, *supra* at 10-11).

The District Court and the Second Circuit reached the conclusion, however, that the *Hallstrom* mandate is only applicable to RCRA actions brought before the Act's 1984 amendment which provided for a single exception to the delay requirement. They then proceeded to conclude that following the 1984 amendments, the pragmatic approach, rejected by this Court in *Hallstrom*, is required in order to serve congressional intent with respect to both the notice[23] and delay requirements.

There is nothing about the 1984 amendments, however, to suggest a wholesale reversal of the Congressional intent as found by this Court. *Hallstrom*, 493 U.S. at 28-29. Nor is there any apparent reason to conclude that the principals of strict construction and application of the notice and delay requirements should be reversed after the 1984 amendments. The limited exception to the delay

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[23] Strict adherence to the notice requirements would "thwart congress's [sic] purpose of providing an exception to the strict notice requirements in instances involving the heightened danger and immediacy of hazardous wastes." (Second Circuit Opinion, App. 21-22).

periods which the amendments introduce is couched in language which implies that Congress had no intent to change the notice requirement – "except that such action may be brought immediately *after such notification* in the case of an action respecting a violation of subchapter III . . . ". (emphasis added). Furthermore, as to the delay requirement, the language of the amendment is poorly chosen if the Second Circuit view is correct. If Congress had really intended that the 1984 amendment have the effect found by the court of appeals, it could easily have conditioned the exception using words such as "in the case of an action in which plaintiff alleges a violation of subchapter III" instead of the more restrictive words "in the case of an action respecting a violation of subchapter III" which were chosen. In fact, if the Second Circuit is correct, any plaintiff wishing to do so could avoid delay periods and subvert the dual purposes of the statute (a) to give governmental agencies the lead in enforcing environmental regulations and (b) to avoid burdening the federal courts, by simply alleging that his lawsuit involved hazardous waste.

This Court should grant this petition and resolve, once and for all, how the notice and delay requirements in the several citizen suit statutes[24] should be construed and applied by the lower courts. Until it does so, the untenable condition currently prevailing will continue and citizen suit plaintiffs and defendants will continue to see inconsistent application of those requirements by the federal judiciary from circuit to circuit.

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[24] This Court in *Hallstrom* noted some of the other federal environmental statutes having notice and delay requirements similar to those in RCRA. See *Hallstrom*, 493 U.S. at 23 n.1.

II. THE OPINION IN THIS CASE DEMONSTRATES AND REFLECTS CONTINUED CONFUSION AND INCONSISTENCY AMONG THE FEDERAL COURTS RESPECTING THE APPLICATION OF FEE-SHIFTING STATUTES UNDER FEDERAL LAW, BOTH AS TO WHEN A FEE AWARD CAN BE ORDERED AND AS TO THE LIMITS OF A COURT'S DISCRETION IN DETERMINING THE AMOUNT OF A FEE AWARD.

A. Plaintiffs did not substantially prevail at trial.

This long and complex lawsuit resulted in plaintiffs obtaining no relief at all. Before plaintiffs commenced their citizen suit actions, the City was under a state court order to install a leachate collection system and a methane control system at the landfill and to close the landfill by January 1, 1990. One of the major objectives of the City in defending plaintiffs' lawsuit was to continue operation of the landfill until the January 1, 1990 date, in the face of plaintiffs' concerted effort to force immediate closure. Plaintiffs also sought extensive other relief by their actions. The district court granted plaintiffs none of the relief sought by them and entered instead its final order requiring closure of the landfill by January 1, 1990 and announcing that plaintiffs had substantially prevailed. Thereafter, refusing to reconsider whether plaintiffs had in fact substantially prevailed, the court awarded plaintiffs' attorney's fees in the amount of $247,534.37, which included a fully compensatory "lodestar" plus a 25% risk/contingency enhancement. The court also awarded

expenses of $10,926.66. The Second Circuit affirmed the attorney's fees and expense award.[23]

The award of attorney's fees in this case raises issues common to the application of fee-shifting provisions included in all of the federal environmental statutes, as well as the Attorney's Civil Rights Fee Awards Act, 42 U.S.C. §1988.[24] The issues of when a party may be deemed to have prevailed, the limits of discretion to be applied in determining downward adjustments of a "lodestar" award where plaintiffs' success is limited, and the appropriateness of enhancement are all issues that continue to confound and split the circuit courts.

B. The Prevailing Party Issue.

If, as petitioner contends, plaintiffs obtained no relief as a result of this litigation, the decisions of this Court in *Hewitt v. Helms*, 482 U.S. 755 (1987) would appear to control and require reversal of the award of attorneys fees. *Hewitt* establishes that at a minimum plaintiffs must obtain some redress – a resolution which affects the

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[23] Since the Second Circuit decision, the district court has made an additional award of $24,113 enhanced by $6,028.25, and additional expenses of $2,707.61. (App. 137). In addition, the Second Circuit has awarded an additional $53,315 for attorney's fees in connection with the appeal to that court. That award is fully compensatory, but not enhanced. The court of appeals also awarded an additional $2,240.34 in expenses. (App. 38). The total attorney's fee and expense award to date is $346,865.23.

[24] This Court recognized that principles respecting fee awards in civil rights matters are applicable in the context of environmental citizens suit litigation in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 560 (1986).

behavior of the defendant towards the plaintiffs – before they can qualify as a prevailing party and holds that a mere judicial statement vindicating plaintiffs' rights is not the equivalent of redress.[25] *Hewitt v. Helms, supra* at 761-763; *see also Rhodes v. Steward*, 488 U.S. 1, 4 (1988) (an entry of judgment for plaintiff will constitute relief "if, and only if, it affects the behavior of the defendant towards the plaintiff"); *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792 (1989) (" . . . at a minimum, in order to be considered a prevailing party . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.") It follows from these decisions that what happened here – the entry of a judgment which vindicates some of the plaintiffs' allegations, but does not change the legal relationship of the parties – does not qualify the plaintiffs as prevailing parties. The City was legally obligated to close the landfill on or before January 1, 1990, at the time plaintiffs brought their actions. That obligation did not change as a result of the entry of the district court's judgment.

Even if the entry of judgment here could be viewed as the granting of some form of relief to the plaintiffs, that relief is, at best, nominal, and should not entitle plaintiffs to prevailing party status. The opinion in *Texas State Teachers' Association* left open the question of

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[25] The Second Circuit ultimately bases its conclusion that plaintiffs met the prevailing party test on its conclusion that the "plaintiffs have achieved a significant vindication of their rights" because "[a] determination by the court that the city had violated provisions of RCRA and the CWA constitutes a change in the legal relationship of the parties that goes beyond what was contained in the Assurance." (App. 31-32).

whether nominal relief awarded to plaintiffs would qualify them as prevailing parties: " . . . [A] technical victory may be so near the situations addressed in *Hewitt* and *Rhodes* as to be insufficient to support prevailing party status." *Id.* at 792. That issue has now split the Circuit Courts, with the Second,[26] Eighth,[27] Ninth,[28] Tenth[29] and Eleventh[30] Circuits holding that an award of nominal damages in the civil rights context establishes prevailing party status and the Fifth Circuit in *Estate of Farrar v. Cain and Hobby*, 941 F.2d 1311 (5th Cir. 1991) holding to the contrary.

C. Downward Adjustment of the Lodestar is Required.

Even if plaintiffs are entitled to prevailing party status, substantial questions remain as to whether the award of fully compensatory and enhanced fees in the light of plaintiffs very limited success is an abuse of discretion.[31] In *Hensley v. Eckerhart*, 401 U.S. 424 (1982), this Court clearly held that where a plaintiff achieves only partial or limited success, the discretion of the court in awarding

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[26] *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991).

[27] *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir. 1988).

[28] *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988).

[29] *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) *cert. denied*, 485 U.S. 976 (1988).

[30] *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987).

[31] Had this case been settled at its outset on a stipulated judgment that the City be ordered to close the landfill on January 1, 1990 – as it surely could have been from the City's standpoint – there would be no question that an award of over $247,000 in attorney's fees would be excessive.

fees does not extend to an award of fully compensatory lodestar fees. *Id.* at 435-437. While *Hensley* does not chart a particular course for downward adjustments in the lodestar where only limited success is obtained, it clearly requires such an adjustment.

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. *This discretion, however, must be exercised in light of the considerations we have identified.*

Id., at 436 (emphasis added).

The *Hensley* decision also establishes that an enhancement of a lodestar fee is appropriate only in rare cases.

> Where a plaintiff has obtained *excellent* results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of *exceptional success* an enhanced award may be justified.

Id. at 435 (emphasis added). The discretion of the district court to award enhanced fees is limited, therefore, to those cases where the result obtained surpasses excellence and attains the status of exceptional. The result in this case simply does not reach that status.

D. Enhancement of the Lodestar Was Improper.

In those rare instances where enhancement may be appropriate, the state of the law regarding a justification for enhancement is deplorable. The issue is whether the

risk of loss, where plaintiff's attorney is not being compensated aside from any recovery obtained under the fee-shifting statutes, justifies enhancement of the lodestar amount. This Court was unable to reach a majority opinion on that subject in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987). Since that case, several courts have adopted the view expressed in Justice O'Connor's concurring opinion: risk/contingency enhancement may be utilized when justified by a "difference in market treatment of contingent fee cases *as a class* rather than on an assessment of the 'riskiness' of any particular case." *Id.* at 731, *see, e.g., Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *Spell v. McDaniel*, 824 F.2d 1380, 1404 (4th Cir. 1987), *cert. denied sub nom. Fayetteville v. Spell*, 484 U.S. 1027 (1988); *Lattimore v. Oman Construction*, 868 F.2d 437, 439, *reh. denied*, 875 F.2d 874 (11th Cir. 1989); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 n. 6 (1987), *vacated in part en banc*, 857 F.2d 1516 (D.C. Cir. 1988); *McKenzie v. Kennickell*, 875 F.2d 330, *reh. denied*, 884 F. 2d 1405 (D.C. Cir. 1989). Stating its disagreement with those circuit courts, and inviting review by this Court,[32] the Second Circuit, even though success on the part of the plaintiff was limited at best, affirmed the district court's award of enhanced fees on its assessment that given the

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[32] "Apart from the anomaly of the views of one justice, with whom no one concurs, being the law of the land, where the court is so divided on an issue and where there is no majority opinion at all, we conclude that the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide." App. 36.

risk of loss peculiar to this case, enhancement was justified because, the district court found, without the opportunity for enhancement this plaintiff would have faced difficulty obtaining competent counsel.

This Court should accept the invitation of the Second Circuit and grant certiorari so that it may review and clarify the law respecting when and to what extent district courts may award attorney's fees under federal fee shifting statutes.

III. THE DECISION IN THIS CASE CREATES A SPLIT AMONG THE CIRCUIT COURTS REGARDING THE SCOPE OF THE REGULATORY SCHEME ADOPTED BY CONGRESS IN THE CLEAN WATER ACT.

The Clean Water Act provides a regulatory scheme for controlling pollution of water. It does not attempt to regulate all pollution of water because such an effort would be too massive and impossible to enforce. Instead, the Act focuses on controlling and regulating certain activities which are subject to a manageable enforcement program. The key to the regulatory scheme is the identification and regulation of certain limited means – "point sources" – by which pollutants are introduced into water. (*See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 at 580-82 (6th Cir. 1988) (discussing limited scope of Clean Water Act regulatory scheme).

The opinion of the Second Circuit corrected the lower court's erroneous finding that water flows from the landfill into the Intervale through the railroad culvert (App. 84). Instead, the Second Circuit correctly observed that "any pollutants in water flowing through the culvert have already entered waters of the United States before

they flow through the culvert." (App. 22). The court of appeals nevertheless upholds the judgment that the City was in violation of 33 U.S.C. §1311(a). That opinion contradicts the plain meaning of the statutory language, contradicts opinions of other circuit courts and expands the scope of the Congressional regulatory scheme so as to make it practicably unenforceable.

The bounds of the regulatory scheme adopted by Congress is contained in the language of 33 U.S.C. §1311(a) and the statutory definitions which supplement that section. Section 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. §1311(a).

The critical limitation on the scope of §1311 is contained in §1362(12) and (14) which provide:

> Except as otherwise specifically provided, when used in this chapter:
>
> * * *
>
> (12) the term 'discharge of a pollutant'. . . means . . . any addition of any pollutant to navigable waters from any point source. . . . '
>
> * * *
>
> (14) the term 'point source' means any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged.

33 U.S.C. §1362(12) and (14).

The statutory language does not prohibit all additions of pollutants to waters of the United States. Nor does it purport to sanction conduct because of events taking place after a non-regulated addition of pollutants

to waters. Instead, the focus of the regulatory scheme, as expressed in the statutes, is clearly centered on the "addition" of pollutants to waters "from a point source." The regulated conduct is the use of a point source to add a pollutant to waters. Rejecting this argument, the court of appeals held that prohibited conduct occurs if, after pollutants are added to waters in a non-regulated manner, the polluted water passes through a discernible, confined and discrete conveyance.

The precise issue raised in this case was before the District of Columbia Circuit Court in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). In a thorough and carefully reasoned opinion, that court, adopting the position taken by the EPA, held that:

> [A]ddition [of a pollutant] from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. . . . [T]he point or nonpoint character of pollution is established when the pollutant first enters navigable water and does not change when the polluted water later passes through [a structure having the physical characteristics of a point source] . . .

Id. at 175

The same position has been taken by the Sixth Circuit in *U.S. ex rel. TVA v. Tennessee Water Quality Control Board*, 717 F.2d 992 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) and in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). Interpreting the §1362(12) and (14) definitions, the Eighth Circuit held that the "discharge of a pollutant requires an 'addition' of a pollutant from a 'point source' . . . " *State of Missouri ex rel. Ashcroft v. Dept. of the Army*, 672 F.2d 1297, 1303-1304 (8th Cir. 1982).

The decision of the Second Circuit in this case cannot be reconciled with the opinions of the other circuit courts interpreting the same provisions of the Clean Water Act. It has the effect of amending the Act and extends the regulatory scheme to a breadth which was not envisioned by Congress when the law was enacted.

This petition should be granted so that this Court may resolve the conflict now existing between the circuit courts, thereby assuring order and uniformity of application in the administration and enforcement of the Clean Water Act.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL B. CLAPP*
ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont 05402-0988

*Counsel of Record

November, 1991

APPENDIX

TABLE OF CONTENTS

Page

VOLUME I

Opinion of Second Circuit Court of Appeals, June 12, 1991 ..... App. 1

Order of Second Circuit Court of Appeals, October 25, 1991 ..... App. 38

Opinion of United States District Court for the District of Vermont, March 26, 1986..... App. 40

Order of United States District Court for the District of Vermont, February 5, 1987 ..... App. 54

Opinion of United States District Court for the District of Vermont, October 16, 1989 ..... App. 59

Judgment of United States District Court for the District of Vermont, May 7, 1990 ..... App. 116

VOLUME II

Opinion of United States District Court for the District of Vermont, March 15, 1990..... App. 118

Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990 ..... App. 130

Order of United States District Court for the District of Vermont, May 4, 1990..... App. 135

Order of United States District Court for the District of Vermont, October 11, 1991 ..... App. 137

Docket Entries, United States District Court for the District of Vermont, first page only .... App. 139

TABLE OF CONTENTS – Continued

Page

Opinion and Order of Second Circuit Court of Appeals, August 20, 1986 ..... App. 142

Order of Second Circuit Court of Appeals, August 20, 1991, denying Motion for Rehearing .... App. 145

United States Constitution, Article I, Section 1 .. App. 147

United States Constitution, Article III, Section 1 ..... App. 147

United States Constitution, Article III, Section 2 ..... App. 147

33 U.S.C. § 1311 ..... App. 149

33 U.S.C. § 1317 ..... App. 150

33 U.S.C. § 1342 ..... App. 157

33 U.S.C. § 1362 ..... App. 178

33 U.S.C. § 1365 ..... App. 183

42 U.S.C. § 6922 ..... App. 188

42 U.S.C. § 6925 ..... App. 191

42 U.S.C. § 6926 ..... App. 209

42 U.S.C. § 6928 ..... App. 215

42 U.S.C. § 6930 ..... App. 228

42 U.S.C. § 6945 ..... App. 224

42 U.S.C. § 6972 ..... App. 232

40 C.F.R. § 254 ..... App. 240

Plaintiffs' complaint ..... App. 244

Affidavit of William W. Pearson dated November 4, 1985 ..... App. 270

TABLE OF CONTENTS – Continued

Page

Letter of October 8, 1985, Attachment A to Affidavit of William W. Pearson ..... App. 273

Letter of November 5, 1985, attached to Affidavit of William W. Pearson ..... App. 275

Affidavit of Steven Goodkind dated December 7, 1989 ..... App. 277

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 415 – August Term 1990
(Argued: October 29, 1990 Decided: June 12, 1991)
Docket NO. 90-7544

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, and ROSE A. BESSETTE,

Plaintiffs-Appellees,

– against –

CITY OF BURLINGTON,

Defendant-Appellant.

Before:

NEWMAN and PRATT, *Circuit Judges,*
GRIESA, *District Judge* for the Southern District of New York, sitting by designation.

PRATT, *Circuit Judge*:

Plaintiffs are owners of land adjacent to the Burlington Municipal Disposal Grounds (the "landfill"). They brought this action against the City of Burlington for alleged violations of state and federal laws arising out of the operation of the landfill. Plaintiffs alleged that the operation of the landfill generally harmed the environment, and the specifically damaged their properties, by

generating methane gas, wind-blown debris, and hazardous waste. The city closed the landfill on December 31, 1989.

The plaintiffs' ten-count complaint sought injunctive relief, civil penalties, compensatory damages, and punitive damages, plus cost and attorneys' fees. Judge Billings held a bench trial on the first five counts of the complaint. Counts I, II, and III were brought pursuant to the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972; count IV was brought pursuant to the citizen-suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365; and count V was brought pursuant to the Vermont Groundwater Protection Law, 10 Vt. Stat. Ann. § 1410.

The district court found that the City of Burlington had operated the landfill in violation of prohibitions against open dumping practices found in 42 U.S.C. § 6945(a); that the landfill may have presented an imminent and substantial endangerment to health or the environment in violation of 42 U.S.C. § 6972(a)(1)(B); and that the landfill had discharged pollutants from a point source into waters of the United States in violation of 33 U.S.C. § 1311. Liability under the remaining common law claims, count VI through X, and the issue of damages on count V, were reserved for trial by jury at a later date.

The district court denied a motion by the city to dismiss counts II, III, and part of IV of the complaint, made on the ground that plaintiffs had failed to comply with the notice and delay requirements for citizen-suits under 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a).

In addition, the court found that the plaintiffs had substantially prevailed and awarded them total attorney's fees, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d), in the amount of $247,534.37, which included a "lodestar" amount of $198,027.50 plus a 25 percent risk/contingency enhancement of $49,506.87. The court also awarded plaintiffs $10,929.66 in expenses including expert fees.

The city appeals all of these rulings.

BACKGROUND

The City of Burlington has owned and operated the landfill since the early 1960s. The landfill is rectangular in shape and is located on approximately eleven acres of land to the north of the commercial-residential center of the city. It is bounded to the east and south by properties owned by the plaintiffs, to the north by a railroad embankment, and to the west and northwest by a marsh area called the Intervale, which has been designated a wetland, as well as by Beaver Pond, which is actually the southeast portion of the marsh. A large stone culvert runs under the railroad and connects the Beaver Pond portion of the marsh with the northeast quadrant if the Intervale.

The Intervale is in the flood plain of the Winooski River. It is inundated or saturated by surface water sufficient to support a variety of vegetation typically adapted for life in saturated soil conditions. The Intervale occasionally floods, leaving the entire area covered with surface water, including parts of the landfill itself. At normal times, water in the culvert is either in equilibrium or flows from south through the culvert. During times of

high water, however, surface water may flow from north to south through the culvert.

Trash is buried in the landfill to a depth of approximately nine feet below the ground water table on the northern edge of the landfill, Historically, rain water and run-off from the land have been able to percolate into the landfill mass. As a result, ground water mixes with and flows through contaminants in the landfill.

The landfill contains typical domestic and municipal wastes as well as materials deposited over the years by local industries. When ground water infiltrates the landfill, the water mixes with the material in the landfill and forms leachate. Leachate is a liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials removed from such wastes. The leachate is generated both by percolation of precipitation into the landfill mass and by the flow of groundwater through the refuse in the landfill. The leachate produced in the landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA. Because the landfill is unlined, the leachate enters the upper gradients or "flow tubes" of ground water under the landfill. The ground water then flows north beyond the landfill boundaries, and the flow tubes of the leachate-contaminated ground water all surface in the Intervale, north of and within 300 feet of the railroad embankment.

Leachate has also emerged from the sides of the landfill via seeps. From there, it flows into Beaver Pond and thence through the culvert under the railroad embankment and into the Intervale. The fact that leachate

from the landfill is toxic to a small fish called the fathead minnow demonstrates that the leachate also kills Daphnia (water fleas) and algae.

In the early 1980s, the State of Vermont began to closely scrutinize the landfill. As a result of the state's investigation, the state and the city entered into an Assurance of Discontinuance on December 15, 1981, which nominally required the city by July 1, 1984, to cease disposing of any refuse in the landfill, with the exception of residue from a planned resource recovery facility. When the city did not comply, the terms of the Assurance were amended several times, the most pertinent amendment ("Amended Assurance") occurring on January 31, 1985. It required that the city install and make operational a leachate collection system at the landfill by September 1, 1985, and that the city install and make operational a methane gas control system by December 1, 1985. It also gave the city two options: (1) select another landfill site and close the current landfill by January 1, 1988, or (2) begin operating a resource recovery facility ("RRF") and close the landfill by January 1, 1990. This Amended Assurance was entered as an order of the Chittenden Superior Court on March 7, 1985.

The city did not timely comply, however, even with the terms of the Amended Assurance. It did not install the leachate collection system of the methane gas control system until March of 1986, after the State of Vermont, on December 18, 1985, had brought an action against the city to enforce the March 7th order. Moreover, the city never notified the state in writing of its choice between the two closure options, despite its obligation to do so. While the

city's board of aldermen did adopt a resolution to pursue the RRF option, the mayor vetoed the resolution.

During the years 1985 and 1986, the state performed its own environmental assessment of the landfill, conducting substantial monitoring and testing of the area in and around the landfill, and collecting both leachate data and biological data. While the state concluded, as a result of its investigation, that the landfill did not, at that time, present an imminent and substantial endangerment to human health of the environment, it did determine that January 1, 1990, was the appropriate closure date in view of the environmental concerns presented by the landfill.

Plaintiffs filed their complaint in this matter on October 9, 1985. The day before, plaintiffs had mailed letters to the defendant city, the State of Vermont, and the Administrator of the Environmental Protection Agency (the "EPA"), notifying them of plaintiffs' contention that the city was operating the landfill in violation of sections 6925, 6930, and 6945 of RCRA, and sections 1311, 1317, and 1342 of the CWA. Plaintiffs moved for a preliminary injunction seeking immediate closing of the landfill. The case was initially referred to the Honorable Jerome J. Niedermeier, United States Magistrate for the District of Vermont, to hear and determine the motion. The city moved to dismiss the complaint primarily on the basis of failure to comply with the notice prerequisites of 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a). The court suggested that the plaintiffs then file a proper notice under RCRA and CWA and reserved decision on the motion to dismiss. Heeding the court's suggestion, the plaintiffs filed a "supplemental" notice.

In February of 1986, the magistrate issued a Report and Recommendation, finding for purposes of the preliminary injunction motion, that the city was in violation of § 6945(a) of RCRA and § 1311(a) of the CWA. However, the magistrate recommended that the court deny plaintiffs' motion at that time and order the city to take certain specific steps toward remedying the violations. Adopting the magistrate's Report and Recommendation *in toto*, the district court denied plaintiffs' motion for a preliminary injunction and ordered the city, within sixty days, to make fully operational both a gas ventilation system and a leachate collection system for the landfill. At this point, the city complied.

After a bench trial, the district court issued its Findings of Fact, Opinion and Order. 732 F.Supp. 458. As to count I, it concluded that the city had not violated the hazardous waste permit and notification requirements of 42 U.S.C. §§ 6925(a) and 6930(a). It based this holdings on the fact that the State of Vermont had authorization to implement its own solid and hazardous waste program pursuant to 42 U.S.C. § 6926(b), and that the state's regulations superseded the requirements under RCRA. Accordingly, the court found that a direct action to enforce the RCRA regulations was not available to the plaintiffs. *See Williamsburgh-Around-the-Bridge Block Assn., et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10 (N.D.N.Y. August 21, 1989); *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C. 1987).

As to count II, which alleged three separate open dumping practices in violation of 42 U.S.C. § 6945(a), the court found that (a) the city had generated methane gas, in violation of 40 C.F.R. § 257.3-8(a)(2), but had abated

that practice on or about December 27, 1985, and since then had not violated this provision; (b) the city had, through a point source, discharged pollutants into waters of the United States without a permit, in violation of 40 C.F.R. § 257.3-3(a); and (c) the city had not contaminated an underground drinking water source beyond the landfill boundary, and therefore had not violated 40 C.F.R. § 257.3-4(a).

As to count III, the court held that the city had violated subchapter III (hazardous waste management provisions) and subchapter IV (solid waste management provisions) of RCRA because the landfill may have presented an imminent and substantial endangerment to health or the environment, and therefore, its continued operation violated 42 U.S.C. § 6972(a)(1)(B).

As to count IV, the court found that the city had violated the CWA by discharging pollutants from a point source (the railroad culvert) into the Intervale without authorization. Finally, as to count V, the court held that the city had violated Vermont's Groundwater Protection Law, 10 Vt. Stat. Ann. § 1410, by altering the character and quality of the groundwater beneath and north of the landfill.

Subsequently, the district court entered an Opinion and Order denying the city's motion to dismiss counts II, III, and part of IV, and it also entered an Opinion and Order granting the plaintiffs' motion for attorney's fees. The district court then entered judgment with respect to its holdings on counts I through IV, and pursuant to Fed.

R. Civ. P. 54(b), certified for appeal the judgment on the federal issues presented by these four counts. The court deferred for future action the damage issues under state law that were presented by count V.

DISCUSSION

The city raises four issues on this appeal. We turn first to the threshold issue of notice and consider (A) whether the district court erred in determining that *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), did not require dismissal of the case. If *Hallstrom* governs, and plaintiffs' mailing of the notice of suit one day before commencing this action was inadequate, we could dismiss the case on that ground alone. However, since we conclude that the district court was correct in finding that the delay requirement was inapplicable in the circumstances of this case, we must also consider the remaining issues raised by the city: (B) that the district court erred in determining that the culvert was a "point source" for purposes of finding a CWA violation; (C) that the district court incorrectly found that the landfill may present an imminent and substantial harm to health and the environment; (D) that the district court erroneously awarded attorney's fees. We shall discuss these issues separately.

A. *Pre-Suit Notice*

Initially, we must determine whether this action must be dismissed because the plaintiffs failed to comply with the notice and delay requirements under the citizen-suit provisions of RCRA and the CWA. *See* 42 U.S.C. § 6972

and 33 U.S.C. § 1365. Section 6972(a) sets forth the specific circumstances under which a citizen may commence a citizen suit, and § 6972(b) provides limitations on this ability to file suit. One type of limitation is the requirement for notice to the defendants and a time period of delay before commencing suit. This case involves three such notice provisions:

> (1) Section 6972(b)(1) of RCRA, which applies to actions brought pursuant to subsection A of § 6972(a)(1), states in relevant part:
>
> > (1) No action may be commenced under subsection (a)(1)(A) of this section –
> >
> > (A) prior to 60 days after the plaintiff has given notice of the violation to –
> >
> > > (i) the Administrator;
> > >
> > > (ii) the state in which the alleged violation occurs; and
> > >
> > > (iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,
>
> *except* that such *action may be brought immediately after such notification* in the case of an *action* under this section *respecting a violation of subchapter III* of this chapter; or
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.
>
> * * *

42 U.S.C. § 6972(b)(1) (emphasis added).

> (2) Section 6972(b)(2), which applies to actions brought pursuant to subsection B of § 6972(a)(1), provides for a 90-day delay period, but is similar to § 6972(b)(1) in all other respects. (3) Section 1365(b) of the CWA, which applies to actions brought pursuant to § 1365(a), requires a 60-day delay period after giving notice to the same relevant parties, but it does not apply if the action alleges a violation of § 1316 or § 1317(a).

To comply with these requirements, plaintiffs' attorney mailed, by first-class mail, letters notifying the defendant city, the State of Vermont, and the Administrator of the EPA of plaintiffs' contention that the city was operating the landfill in violation of 42 U.S.C. §§ 6925, 6930 and 6945 and 33 U.S.C. §§ 1311, 1317, and 1342. Plaintiffs, however, did not wait out the delay periods. In fact, the very next day, they filed their complaint with the district court. After the court found that the letter did not meet all the substantive requirements for notice under RCRA and the CWA and ordered the plaintiffs to file a proper notice, plaintiffs then mailed a "supplemental" notice, whose content satisfied the statutory requirements, but whose timing provides one of the major issues on this appeal.

The city relies on the Supreme Court's recent decision in *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989), in urging that the plaintiffs' action must be dismissed because their failure to adhere to the statutory notice and delay provisions both prohibits the commencement of the action and, at the same time, deprives the district court of

subject matter jurisdiction to entertain the action. In *Hallstrom*, the Court stated that § 6972(b)'s notice and delay requirements are "mandatory conditions precedent to commencing suit under the RCRA citizen-suit provision; a District Court may not disregard these requirements at its discretion." Pointing to the clear statutory language and plaintiffs' failure to give any notice either to the Administrator or to the state where the violation occurred until after the suit commenced, the Supreme Court dismissed the complaint despite the fact that the case had gone to trial and the plaintiffs had won on the merits. *Hallstrom*, 110 S.Ct. at 311. The city here argues that the Court's refusal in *Hallstrom* to depart from the literal meaning of the notice requirements compels dismissal of the plaintiffs' complaint as "barred by the terms of the statute."

The district court rejected this argument. 733 F.Supp. 23. It held that *Hallstrom* did not control because that case did not address a situation where the plaintiffs allege a claim "respecting a violation of subchapter III", which deals with hazardous waste pollution. The court concluded the *Hallstrom* was applicable only to situations where no hazardous waste violations were alleged, and since the instant complaint raised two claims arising under subchapter III, dismissal pursuant to *Hallstrom* was not necessary.

We agree with the district court, at least to an extent sufficient to uphold the court's jurisdiction. The 1984 amendments to RCRA and the CWA, 42 U.S.C. § 6972(b) and 33 U.S.C. § 1365(b), respectively, made clear that at least plaintiffs' hazardous waste claims in count I (subchapter III violations) could be brought immediately after

giving notice to the administrator of the EPA, the state and the alleged violator. The remaining question, therefore, is whether the notice and delay requirements apply when allegations of subchapter III violations are combined with non-subchapter III claims in a single "hybird" complaint. Neither congress nor the Supreme Court in "Hallstrom" addressed the problems associated with this type of "hybird" situation.

The city argues that the Supreme Court's holding and strong language in *Hallstrom* mandate dismissal of this "hybrid" complaint. It also argues that if plaintiffs could circumvent the delay requirements by simply asserting a subchapter III claim, whether or not such a claim has merit, the congressional policy for delay would be effectively nullified.

The delay periods in the citizen-suit provisions result from a congressional compromise "between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 110 S.Ct. at 310. Compliance with the notice and delay provisions fulfills this congressional goal in two ways. First, governmental agencies can take the lead in enforcing environmental regulations, with the hope that "an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts," *Id.* Second, the alleged violator is given a nonadversarial period in which he has the opportunity to comply with the law, thus obviating the need for the citizen suit. *Id.*

In the 1984 amendments to RCRA, however, congress abrogated the delay periods when an "action" under

§ 6972 "respect[s]" a violation of the hazardous waste management provisions (subchapter III) of RCRA. 42 U.S.C. §§ 6972(b)(1)(A) and 6972(b)(1)(B). When violations of the EPA's permit requirements for hazardous wastes are involved, congress felt it necessary to carve out exceptions to the delay requirements so that citizen suits could be brought immediately. *Hallstrom*, 110 S.Ct. at 309. Congress obviously determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications for the pre-suit delay periods. It struck the balance in favor of prompt citizen enforcement of hazardous waste violations over its other policy aims of encouraging nonjudicial and nonadversarial resolution of environmental conflicts.

The district court found that under the city's interpretation, a citizen would have to choose between (1) delaying 60 days before bringing the hazardous claim so that all the claims could be brought simultaneously, or (2) filing the hazardous waste claim immediately after notice is given and then seeking leave to amend the complaint to add the remaining claims after 60 days has passed. If felt that plaintiffs with subchapter III claims should not have to make this choice. Thus, the court held that when plaintiffs have a "hybrid" complaint, the delay periods otherwise required before commencing a non-subchapter III suit become inapplicable.

The district court reasoned that the policy reasons for requiring a delay period, as identified in *Hallstrom*, were no longer important once a hazardous waste violation was alleged. First, when hazardous waste violations are involved, the interest of promoting initial governmental

enforcement action is substantially diminished, as is the preference for administrative resolution: "[T]here is no need to maintain a window of opportunity for the government to take the lead enforcement role as to non-subchapter III claims when a citizen, acting as a private attorney general, has already lawfully assumed the lead role in bringing a subchapter III claim against the same facility." 733 F.Supp. at 26. Second, when a citizen suit is filed to enforce hazardous waste violations, the citizen and the alleged violator are automatically placed in an adversarial posture; therefore, the district court concluded, the filing of a citizen suit involving subchapter III claims, immediately after giving notice, effectively eliminates the opportunity for the alleged violator to achieve compliance with the non-subchapter III claims in a non-adversarial climate.

We agree with the analysis if the district court. Although the Supreme Court's language in *Hallstrom* leans toward a strict application of the notice and delay requirement, rigid adherence in this case, which involves hazardous wastes, would lean too far, for it would circumvent congress's intent in enacting these statutes. *Hallstrom* is therefore distinguishable, because there the plaintiffs had plainly disregarded the language of the statute by filing a complaint alleging only non-subchapter III violations without mailing any notice whatsoever. Here, plaintiffs did give notice to the appropriate parties identified in the statute, and then filed their "hybird" complaint the next day, alleging violations of both subchapter III and non-subchapter III provisions.

Although the city's argument – that plaintiffs can easily circumvent the delay requirements by simply alleging a subchapter III violation, whether or not it is meritorious – does raise some concern, we do not think it outweighs congress's manifest intent to encourage quick citizen enforcement of hazardous waste violations of subchapter III. Of course, if a plaintiff should allege frivolous subchapter III claims, he would not only be subject to rule 11 sanctions, but his claims could also be dismissed early in the litigation process, and the court, by stay or dismissal, could require full observance of the delay period. Moreover, in order to eliminate the delay requirement with a "hybird" complaint, the two types of violations would have to be closely related. In this case, for example, plaintiffs' subchapter III and non-subchapter III claims all arose from the operation of a single facility and are based on the same core of interrelated facts.

In addition to its general argument that counts II and IV must be dismissed because they were filed prematurely, the city also makes more particular arguments as to why it believes that all the counts should be dismissed.

1. *EPA-Authorized State Hazardous Waste Program*

The city claims that RCRA's exception to the delay requirements for subchapter III actions is not applicable in Vermont because that subchapter has been superseded by Vermont's approved Hazardous Waste Management Plan pursuant to 42 U.S.C. § 6926(b). We disagree. We note initially that Plaintiffs' complaint contains two counts that allege hazardous waste violations – counts I and III. Count I was brought pursuant to subsection A of

the citizen suit provision, 42 U.S.C. § 6972(a)(1), and count III was brought pursuant to subsection B.

Within the general citizen suit provision of RCRA (§ 6972(a)(1)), two separate subsections specify two different types of actions that may be brought. Subsection A primarily addresses violations of permits, standards, regulations, and the like. Subsection B allows causes of action against those whose activities "ha[ve] contributed or * * * [are] contributing to the past or present handling, storage, treatment, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment".

Pursuant to § 6926(b), an EPA-authorized state hazardous waste program, like that in Vermont, can supersede the permit and notification requirements of subchapter III of RCRA. However, a state's own hazardous waste program affects only those actions brought pursuant to subsection A, *i.e.*, those that depend upon the specific permit and notification requirements in subchapter III. Subsection B, on the other hand, is more general, and allows a direct cause of action against those whose activities "may present an imminent and substantial endangerment to health or the environment". Thus, a subsection B suit does not depend on any specific subchapter III provision, nor is it superseded by a state program.

In this case, the district court did find that the federal permit and notification requirements of subchapter III of RCRA were superseded by the EPA-authorized state hazardous waste program, and thus, that a direct action pursuant to subsection A of the citizen suit provision to

enforce § 6925(a) and § 6930(a), as alleged in count I of plaintiffs' complaint was not available. *See Williamsburgh-Around-the-Bridge Block Assn., et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10 (N.D.N.Y. August 21, 1989); *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C. 1987). However, the district court also found that count III, brought pursuant to subsection B, alleged a claim "respecting a violation of subchapter III" sufficient to trigger RCRA's exception to the delay period. We are not as confident as the district court that count III was a claim "respecting a violation of subchapter III," although the defendant apparently conceded that it was. *See* 733 F. Supp. at 27. But count I does not cease to be sufficient to keep the "hybrid" complaint in court simply because count I ultimately proved to be unsuccessful. *Hallstrom* makes clear that the notice determination is to be made at the outset, and in this case count I survived defendant's motion for summary judgment. For this reason, the exception to the delay requirement for this "hybrid" complaint applies.

2. *Commencement and Prosecution of an Action by the State*

The city next argues that count II is prohibited by the provisions of subsection B of § 6972(b)(1) (not to be confused with § 6972(a)(1) discussed above), because the state had already obtained an order from a state court requiring compliance with the standards alleged to have been violated. In this connection, the state had entered into an Assurance of Discontinuance with the city, which agreement was filed and entered as an order of the state court, Subsection B of § 6972(b) does provide that if "the Administrator or State *has commenced and is diligently*

prosecuting a civil or criminal action * * * to require compliance" (emphasis added), a citizen's enforcement action cannot be commenced.

We do not think that what the state did in this situation falls within this provision. The Assurance in this case was an agreement between the state and the city that was simply filed and entered as an order of the state court. No "civil or criminal action" was ever commenced against the city to require compliance with federal regulations. Even if the Assurance were to be viewed as an action to compel compliance with federal regulations, the state could not be held to have "diligently prosecut[ed]" the action. The only thing the state ever did to try to enforce the assurance was to bring an action to compel compliance with provisions of the Assurance that required the city to install a methane gas control system and a leachate collection system. This action was not taken until the deadline for installation had already passed. The plaintiffs had already filed this action and the district court had ordered the city to install operational systems before the city complied. Beyond this one action, the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the city numerous extensions. Given these facts, the state's conduct in this case does not meet the level of diligence that would trigger the prohibition against a citizen suit. *See Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57 (2d Cir. 1985).

3. *CWA Exception to Delay Requirement*

The city also claims that although an exception to the 60-day delay requirement exists under § 1365 of the CWA

for actions respecting either § 1316 or § 1317(a) of the act, neither exception is applicable in this case. The city is correct because no § 1316 violation was alleged and because § 1317 imposes obligations only on the EPA administrator, not the defendant city. But the point is irrelevant. Because, as we discussed earlier in this opinion, the CWA claim was brought as part of a "hybrid" complaint, which simultaneously alleged hazardous waste violations under RCRA, there was no need to observe the 60-day delay requirement of § 1365.

4. *Content Requirements of Notice Provisions*

Finally, the city argues that the plaintiffs' notice did not comply with the content requirements of the statutory and regulatory notice provisions, thus mandating dismissal under *Hallstrom*. In the first place, *Hallstrom* did not address such technical criteria. Moreover, the drastic measure of dismissal should not be used at this stage of the litigation.

As a practical matter, notice in a subchapter III case accomplishes little other than notifying the appropriate governmental agencies and the alleged violator that the filing of a complaint by citizens is imminent. In contrast, in a non-subchapter III case, specific notice gives the appropriate governmental agencies an opportunity to act and the alleged violator an opportunity to comply. Because prior notice in suits involving hazardous wastes is of minimal value, dismissal should not follow in this case merely because plaintiffs failed to comply with some very technical aspects of the notice provisions. To hold otherwise not only would allow form to prevail over

substance, but also would thwart congress's purpose of providing an exception to the strict notice requirements in instances involving the heightened danger and immediacy of hazardous wastes. *See Hallstrom*, 110 S.Ct. at 309. Thus, the supplemental notice served in response to the district court's suggestion was sufficient.

B. *Point Source*

We next consider the issue of whether the district court erred by concluding that the railroad culvert was a point source for the discharge of pollutants and therefore that the city was violating 33 U.S.C. § 1311(a). Pollutants from the landfill directly enter Beaver Pond before flowing through the culvert into the rest of the Intervale. Both Beaver Pond and the rest of the Intervale are parts of the marsh, and both are considered navigable waters for purposes of the CWA. Thus, any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert.

Section 1311(a) provides:

> "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

Section 1362(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source". Section 1362(14) defines a "point source" as

> "any discernible, confined and discrete conveyance including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

The city contends that the railroad culvert was not a point source for the discharge of pollutants. According to the city, the definition of a point source incorporates both physical and functional characteristics. Although it acknowledges that the culvert has many of the physical characteristics of a point source, it alleges that the culvert does not meet the functional requirements, because the culvert does not "add" pollutants to navigable waters. Under this argument, pollutants would be "added" only when they are introduced into navigable waters for the first time.

The definition of a point source is to be broadly interpreted:

> The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). In *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361 (D.N.H. 1985), the court held that waste materials which collected in a ditch and from there entered a brook and ultimately entered navigable waters violated § 1311(a). In *United States v. Velsicol Chemical*

Corp., 438 F.Supp. 945, 947 (W.D. Tenn. 1976), the court found discharges into the city sewer system, which, in turn, emptied into the Mississippi River to be in violation of the CWA. It rejected the argument that the pollutants must be discharged directly into navigable waters. *Id.* The fact that the defendant discharged pollutants through conveyances owned by another party was irrelevant. The court found that the defendant knew or should have known that the city sewers led directly into the Mississippi River and this was sufficient to satisfy the CWA requirements. *Id.*

Given the intended broad reach of § 1311(a), we agree with the district court that the Burlington culvert was a point source. We also note that the definition of "discharge of a pollutant" refers to "any point source" without limitation. 33 U.S.C. § 1362 (12). Since the city's landfill caused pollutants to enter Beaver Pond, and since these pollutants were then conveyed into the rest of the Intervale by the railroad culvert, the district court's conclusion that the city discharged pollutants into navigable waters from a point source properly applied the statute to findings that were not clearly erroneous.

C. *Imminent and Substantial Endangerment*

The city next challenges the district court's conclusion that the landfill may present an imminent and substantial endangerment to health or the environment. It asserts that there is no evidence to support the court's conclusion, because (1) the mere presence of chemicals found on the list of toxins, without regard to their concentrations, does not evidence an endangerment; (2) the

state environmental investigation concluded that the landfill and its leachate did not present an imminent and substantial endangerment to the environment; and (3) plaintiffs' expert, Dr. Reed, did not cite evidence in support of his opinion. We disagree with the city's contention that the district court erred.

Section 6972(a)(1)(B) authorizes citizens to sue an owner or operator of a disposal facility which has contributed or is contributing to the past or present "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). When congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. RCRA's waste management requirements for disposal facilities are designed not only to prevent, but also to mitigate, endangerments to public health and the environment. *See id.*

Significantly, congress used the word "may" to preface the standard of liability: "present an imminent and substantial endangerment to health or the environment". *United States v. Price*, 668 F.2d 204, 213 (3d Cir. 1982); *United States v. Waste Industries, Inc.*, 734 F.2d 159, 166 (4th Cir. 1984). This is "expansive language", which is "intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *Price*, 668 F.2d at 213-14 (emphasis added). *See also Middlesex County Board of Chosen Freeholders v. New Jersey*, 645 F.Supp. 715,

722 (D.N.J. 1986); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361, 1393 (D.N.H. 1985).

The statute is "basically a prospective act designed to prevent improper disposal of hazardous wastes in the future". *Waste Industries*, 734 F.2d at 166 (quoting H.R. Committee Print No. 96-IFC 31, 96th Cong., 1st Sess. at 32 (1979) ("the Eckhardt Report")). It is not specifically limited to emergency-type situations. *Waste Industries*, 734 F.2d at 165. A finding of "imminency" does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." *Environmental Defense Fund v. Environmental Protection Agency*, 465 F.2d 528, 535 (D.C. Cir. 1972) (quoting EPA Statement of Reasons Underlying the Registration Decisions); *Ottati & Goss*, 630 F.Supp. at 1394. Imminence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *Price*, 668 F.2d at 213 (quoting the Eckhardt Report); *Waste Industries, Inc.*, 734 F.2d at 166.

In addition, a finding that an activity may present an imminent and substantial endangerment does not require actual harm. *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984). Courts have consistently held that "endangerment" means a threatened or potential harm and does not require proof of actual harm. *Ottati & Goss*, 630 F.Supp. at 1394; *United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 885 (E.D. Ark. 1980). *See also Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976) ("[c]ase law and dictionary definition

agree that endanger means something less than actual harm").

The evidence presented at trial supports the district court's findings that the landfill presented an imminent and substantial endangerment to health and the environment. The landfill had been leaking hazardous chemicals into the soil, into groundwater beneath and to the north of the landfill, and into surface waters of the Intervale wetland. Even after installation and operation of the leachate collection system in 1986, at least 10 percent of the leachate, which contains toxic and hazardous chemicals, was still migrating from the landfill into the groundwater and surface water in and around the landfill. Standard bioassay techniques revealed that leachate from the landfill was toxic to freshwater aquatic life, including at least one vertebrate in the food chain. At the time it last assessed the landfill on September 21, 1988, the state determined that "the Burlington Landfill has inadequate separation distance to groundwater and inadequate isolation distance to surface water. Monitoring of both ground water and surface water has indicated impacts to water quality."

The amount and presence of toxic chemicals, including lead, found in groundwater wells have increased over time, and are bio-accumulating in the Intervale. Some of these toxic chemicals, which continue to migrate from the landfill, may have a dramatic, adverse impact on the food chain in the Intervale. While the cattails in the Intervale tend to be resistant to toxic chemicals, the marsh is a "climax" system, *i.e.*, cattails can stand in the face of chemical insult, but when deterioration of them finally

can be seen, they will degrade quickly, and that will be "long pass the point * * * of saving the system."

In addition, the district court based its finding on (1) the fact that leachate which escaped from the landfill contained chemicals and compounds found on the EPA toxic list; (2) the fact that the state, on the basis of its independent environmental investigation in and around the landfill, had concluded that January 1, 1990, was an appropriate closing date for the landfill; and (3) "other evidence in this case, such as Dr. Reed's expert opinion".

Based on all of the foregoing, the district court properly concluded that there were sufficient circumstances that may present an imminent and substantial endangerment to health or the environment.

D. *Attorneys' Fees*

We now consider the city's claim that the district court abused its discretion in awarding attorney's fees. The district court awarded total attorney's fees in the amount of $247,534.37, which included a "lodestar" amount of $198,027.50 plus a 25 percent risk/contingency enhancement of $49,506.87. It also allowed $10,929.66 in expenses, including expert fees.

The city argues first that the plaintiffs were not prevailing parties or substantially prevailing parties, as required by the statute. *See* 42 U.S.C. § 6792; 33 U.S.C. § 1365. Second, the city argues that, even if the plaintiffs were prevailing parties, the district court erroneously awarded their attorneys the full amount of the fee requested, without a downward adjustment for limited

success. Finally, the city argues that, at the very least, the 25 percent enhancement was error. We consider each of these claims in turn.

Although we note that most of the cases cited involve the Attorney's Civil Rights Fee Awards Act, 42 U.S.C. § 1988, the principles governing fee awards under that act are applicable to the attorney's fee provisions before us because of their substantially similar language. *See Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986) (*Delaware Valley I*).

1. *Prevailing Party*

Both RCRA and the CWA provide for an award of a reasonable attorney's fee "to the prevailing party or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6792; 33 U.S.C. § 1365. The first hurdle for plaintiffs seeking a fee award is the requirement that they be prevailing parties. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To qualify, a plaintiff must "'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). *See also Texas State Teacher's Assn. v. Garland Independent School District*, 109 S.Ct. 1486, 1493 (1989) (rejecting "central issue" test and reaffirming "significant issue" test). This test has been characterized as a "generous formulation" to get plaintiffs across the statutory threshold. *Hensley*, 461 U.S. at 433.

Even with this broad interpretation, however, a plaintiff must "receive at least some relief on the merits of

his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). He "must be able to point to a resolution of the dispute which changes the legal relationship between [himself] and the defendant." *Texas Teachers*, 109 S.Ct. at 1493; *Hewitt*, 482 U.S. at 760-61; *Rhodes v. Stewart*, 109 S.Ct. 202, 203 (1988). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas Teachers*, 109 S.Ct. at 1493. Thus, success on legal claims that are "purely technical or *de minimis*" should not result in fee awards. *Id.*

We do not accept, however, the city's characterization of the plaintiffs' success in this case as "purely technical or *de minimis*". Under the *Texas Teachers* standard, the city argues, we should not only compare the relief obtained with the relief sought, but also, compare the city's legal obligations before commencement of litigation with its obligations after the district court's judgment. According to the city, plaintiffs did nothing to change the status quo, because its legal obligations had already been fixed by the Assurance of Discontinuance that was entered as an order of the state court.

Although the district court's judgment contains essentially the same remedy as the Assurance, in that both of them mandate closing the landfill by 1990, the plaintiffs did "prevail" in this action, within the federal statutory definition, because, in large part, it was the pressure generated by the plaintiffs' efforts here that caused the city to actually close the landfill.

The city had been granted extension after extension postponing the initial deadline specified in the original Assurance. The Amended Assurance was one in a series of many. The city should have closed the landfill by January 1, 1988, because it did not opt for a resource recovery facility. Instead, the city obtained more extensions and continued to operate the facility for two more years. In fact, until trial in the court below of the federal statutory claims, the city would not even concede either that the decomposition of garbage in the landfill caused the pre-December 27, 1985 explosive levels of methane gas at the landfill boundary, or that leachate, which escaped the leachate collection system, was migrating beyond the landfill boundary.

Only by bringing this suit against the city were the plaintiffs finally able to get from the city action as opposed to mere promises. "The real value of the judicial pronouncement * * * is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Hewitt*, 482 U.S. at 761 (emphasis in original). *See also Rhodes v. Stewart*, 109 S.Ct. 202, 203 (1988). We are satisfied that the plaintiffs have achieved a significant vindication of their rights under federal laws as a result of this lawsuit. *Gingras v. Lloyd*, 740 F.2d 210, 212 (2d Cir. 1984).

Despite the city's assertion that such reasoning is speculation, we do not think that the district court's finding that the plaintiffs "prevailed" under the circumstances of this action is clearly erroneous. A determination by the court that the city had violated provisions of RCRA and the CWA constitutes a change in the legal

relationship of the parties that goes beyond what was contained in the Assurance.

2. *Fully Compensatory Lodestar*

The city's other arguments relate to "the degree of the plaintiff's overall success [which] goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Gingras*, 740 F.2d at 212. The district court awarded plaintiffs' attorneys the full fee requested, which covered all time spent on all aspects of the case. It found that both the hourly rate requested and the hours expended were reasonable in light of the complexity of the litigation. The city argues that the district court erred by not limiting its award to an amount commensurate with the plaintiffs' limited success. The city claims that the award erroneously included time spent on the failed arguments on the RCRA permitting and notification requirements; the failed effort to have the landfill declared an open dump; the failed effort to obtain a preliminary injunction; the unsuccessful interlocutory appeal to this court from the order denying the preliminary injunction; and all work done on the pendent state claims for which no fees may be awarded.

Because we think there is sufficient basis for the district court's findings, we hold that the court did not abuse its discretion in awarding plaintiffs' attorneys a fully compensatory fee award. Once a party is deemed to have prevailed, a "reasonable attorney's fee" is to be determined in the exercise of the district court's discretion. *Hensley*, 461 U.S. at 437.

The starting point for calculating a reasonable attorney's fee is "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984); *Hensley*, 461 U.S. at 433. Adjustments to that initial estimate can be made by considering the special circumstances of each particular case. *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Blum*, 465 U.S. at 888. However, there is a presumption that the lodestar figure is reasonable. *Blum*, 465 U.S. at 897.

Although "the most critical factor is the degree of success obtained", *Hensley*, 461 U.S. at 436, where a case presents a common core of facts and related legal theories, district courts should "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 435. *See also Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1259 (2d Cir. 1987). When the issues are intertwined factually, a fully compensatory fee award is justified even where a plaintiff does not prevail on all his claims or obtain all relief requested in his complaint. *Dominic*, 822 F.2d at 1259.

When some reduction is called for, a district court generally will attempt either "to identify specific hours that should be eliminated or * * * simply reduc[e] the award to account for the limited success of the plaintiff." *Texas Teachers*, 489 U.S. at 876 (citing *Hensley*, 461 U.S. at 437). However, reductions are not always required when plaintiffs fail to succeed on every issue. Here, the district could did not abuse its discretion by determining that the complexity of this case justified a fully compensatory award. Nor did the district court err by rejecting the

city's efforts to trivialize the plaintiffs' success. There is no mathematical formula by which to compare the total number of issues with the number of issues prevailed upon. *Hensley*, 461 U.S. at 436 n. 11. All of plaintiffs' claims arose from the operation of a single facility and were "based on related legal theories." *Dominic*, 833 F.2d at 1259. There was simply no need for the district court to engage in an "artificial distribution" of attorney time between successful and unsuccessful claims. *Id.* Its lodestar award of $198,027.50 was, under the circumstances of this case, fully justified.

3. *25 Percent Enhancement for Contingency/Risk*

Finally, the city challenges the district court's grant of a 25 percent enhancement to its fully compensatory award of attorney's fees. Relying upon the contingency/risk factor, the district court found that the enhancement was justified under the circumstances of this case.

In *Hensley*, the Supreme Court stated that "in some cases of exceptional success an enhanced award may be justified." *Hensley*, 461 U.S. at 435. Since this general declaration, however, the Court has gradually narrowed the circumstances under which an enhancement might be appropriate. An enhancement is no longer justified on the basis of factors such as the novelty of the issues, the complexity of the litigation, the high quality of the representation, or the number of people benefited. *Blum*, 465 U.S. at 898-900; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*). All these factors are considered subsumed in the calculation of the lodestar, because they are

deemed to be adequately reflected in the hourly rate and the number of hours expended on the litigation. *Blum*, 465 U.S. at 898-900; *see also Delaware Valley I*, 478 U.S. at 565.

The enhancement possibility suggested by *Hensley* has thus eroded to the point where apparently the only thing that may still justify an enhancement is the contingency/risk factory. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"). In *Delaware Valley II*, the Court grappled with the question of whether and when the risk of nonpayment could be considered in granting an enhancement to a fee award. The Court concluded that no upward adjustment was justified in that case, but the issue sharply divided the Court, resulting in an inconclusive 4-1-4 decision.

Four justices flatly rejected any multipliers or enhancements to the lodestar figure to compensate for the risk of loss under fee-shifting statutes. *Delaware Valley II*, 483 U.S. at 725-26. Justice O'Connor concurred in finding that no enhancement could be granted in the case, but refused to flatly reject multipliers in all cases. *Id.* at 731 (O'Connor, J., concurring). She felt that contingency enhancements were appropriate in some circumstances, but in a narrower class of cases than the dissent would allow. *Id.* In addition to the requirements expressed by the dissent, Justice O'Connor would also require that plaintiffs "establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* at 733. The other four justices held that courts could award contingency enhancements if the plaintiff could

establish that the case was taken on a contingent basis and that the plaintiff's attorney had been unable to mitigate the risk of nonpayment either through extracting some significant partial payment from the client or through signing on for a large prospective damage award. *Id.* at 735 (Blackmun, J., dissenting).

Given the outcome in *Delaware Valley II*, we do not view any one of the three separate opinions dispositive on the issue before us today. We note that one of the justices that heard the case is no longer on the Court. While some courts view Justice O'Connor's concurring opinion as being the controlling law, *see, e.g., Alberti v. Klevenhagen*, 1990 Westlaw 19646 (5th Cir. 1990); *Spell v. McDaniel;* 824 F.2d 1380, 1404 (4th Cir. 1987); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1346, 1451 (3d Cir. 1988); *McKenzie v. Kennickell*, 875 F. 2d 330 (D.C. Cir. 1989); *Save Our Cumberland Mountains, Inc. v Hodel*, 826 F.2d 43, 53 n. 6 (D.C. Cir. 1987); *Lattimore v. Oman Construction*, 868 F.2d 437, 439 (11th Cir. 1989), we disagree. Apart from the anomaly of the views of one justice, with whom no one concurs being the law of the land, where the Court is so divided on an issue and where there is no majority opinion at all, we conclude that the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide. Thus, we are left with our own holding in *Friends of the Earth, v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987), which affirmed the approach we took in *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986).

Judge Billings, therefore, correctly relied on *Friends of the Earth*, where we stated that the critical inquiry was "whether '[w]ithout the possibility of a fee enhancement * * * competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" *Id.* at 298 (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). Applying this standard, Judge Billings found that under the fee arrangements here, plaintiffs' attorneys would not have been compensated at all unless plaintiffs had prevailed, and that the risk of not prevailing was substantial. After considering the memoranda and affidavits on file, the court also found that absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence for this difficult case in a complicated field of law. In light of these findings, the district court determined that a 25 percent enhancement was appropriate to attract competent counsel without providing a windfall. Because the court's findings are not clearly erroneous, the district court was justified in concluding that the plaintiffs' attorneys were entitled to a 25 percent enhancement.

CONCLUSION

We affirm the judgment of the district court in all respects.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 25th day of October, one thousand nine hundred and ninety-one.

PRESENT:

HONORABLE JON O. NEWMAN,

HONORABLE GEORGE C. PRATT,
Circuit Judges,

HONORABLE THOMAS P. GRIESA,
District Judge for the Southern District of New York, sitting by designation.

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ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,

Plaintiffs-Appellees,

- against -

CITY OF BURLINGTON,

Defendant-Appellant.

No. 90-7544

(Filed Oct. 25, 1991)

----------x

Plaintiffs-appellees have moved for attorneys' fees and expenses in connection with their successful opposition to defendant's appeal from the judgment of the

District Court of Vermont. By opinion filed June 12, 1991, we affirmed the district court.

Plaintiffs seek attorneys' fees for the appeal based on a "lodestar" figure of $53,315, a claimed 25% risk enhancement of $13,328.75, and expenses of $2,240.34. Defendant has not opposed the motion, which was originally filed on June 26, 1991.

After due deliberation, it is ORDERED, ADJUDGED, and DECREED that the motion is granted to the extent of allowing plaintiffs the "lodestar" figure of $53,315 and the claimed expenses of $2,240.34, for a total of $55,555.34. The amount requested for "risk enhancement" is denied. The "risk" involved in defending an appeal is not significant and, in the circumstances of this case, calls for no enhancement to the "lodestar" amount.

/s/ Jon O. Newman
Jon O. Newman, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

/s/ Thomas P. Griesa
Thomas P. Griesa, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE and ROSE A. BESSETTE	:	
v.	:	
CITY OF BURLINGTON	:	Civil Action No. 85-269
CITY OF BURLINGTON	:	
v.	:	
GENERAL ELECTRIC COMPANY, INC., BLODGETT COMPANY, INC., EDLUND COMPANY, INC., E.B. & A.C. WHITING COMPANY and HAGAR HARDWARE COMPANY	:	

OPINION

I. Introduction

Plaintiffs bring this action against the City of Burlington ("City") for alleged violations of federal and common law arising out of operation of the Burlington Municipal Disposal Grounds ("Landfill") under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under common law theories of nuisance, negligence, strict liability and trespass. Plaintiffs seek injunctive relief, imposition of civil penalties, compensatory and punitive

damages, costs and attorney's fees. Plaintiffs allege that the operation of the Landfill has generally harmed the environment and has specifically damaged their adjoining properties by generating hazardous waste, methane gas and wind-blown debris. After the action was initiated, the City filed a third-party complaint against various companies that allegedly disposed of hazardous wastes in the Landfill.

Currently before this Court is plaintiffs' motion for preliminary injunction. The City opposed plaintiffs' motion. The companies neither appeared nor participated in the preliminary injunction proceedings. The Hon. Jerome J. Niedermeier, Magistrate for this district, considered the motion papers and issued a Report and Recommendation in which he recommended that, while the City is violating § 6945(a) of the RCRA and § 1311(a) of the CWA, the motion to enjoin the City from operating the Landfill be denied and that the City be ordered to cause its gas ventilating and leachate collection systems to become fully operational within sixty days of this Order. Magistrate's Report and Recommendation, *Dague v. City of Burlington*, Civ. No. 85-269 (D.Vt. Feb. 21, 1986). Objections to the Magistrate's Report and Recommendation have been filed by plaintiffs, by the City, and by third-party defendants General Electric Company, Inc., Hagar Hardware Company and E.B. & A.C. Whiting Company. Based upon our analysis of the case at this stage of the proceedings, we adopt the Magistrate's Report and Recommendation *in toto*. We DENY plaintiffs' motion for preliminary injunction, but we ORDER the City to bring the pollution preventive systems into full operation within sixty days from the date of this Order.

II. Findings of Fact

The Magistrate's Report contains thirteen and one half pages of detailed and extensive findings of fact. For the purposes of this preliminary injunction motion only, *see University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), we adopt these findings of fact and incorporate them herein. Because our findings are binding upon this preliminary injunction proceeding only, the objections to the findings posed by defendant City and third-party defendants General Electric Company, Inc., Hagar Hardware Company and E.B. & A.C. Whiting Company are rendered inoperative. With regard to plaintiffs' objections it should be noted that "[t]he Plaintiffs agree with almost all the findings of fact made by the Magistrate." Plaintiffs' Objections to Magistrate's Report and Recommendation ("Plaintiffs' Objections") at p.5. Plaintiffs raise seven specific objections to the Magistrate's findings of fact. *See* Plaintiff's Objections, Attachment A. We find these objections to be *de minimus* and inconsequential. Accordingly this Court will not alter the findings of fact as set out in the Magistrate's Report and incorporated herein.

III. Discussion

The proposed conclusions contained within the Magistrate's Report were thoughtful and well-reasoned. With the additions discussed below, we adopt the Magistrate's proposed conclusions *in toto*. As the Magistrate noted, these conclusions are for the purposes of the preliminary injunction motion only. *See* Magistrate's Report at p. 16; *University of Texas v. Camenisch, supra* at 395. For that reason, the only objections which we need consider at

this juncture are those substantive objections by plaintiffs. These objections are discussed below, *seriatim*.

A. Permit and Notice Requirements of RCRA – §§ 6925(a) and 6930(a)

In order to bring a citizen suit under RCRA, plaintiffs must demonstrate that the defendant

1. is "in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [42 U.S.C. § 6901, *et seq.*];" or

2. "has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

42 U.S.C. § 6972(a). Plaintiffs alleged in their preliminary injunction motion that the City violated the permit and notice requirements of 42 U.S.C. §§ 6925(a) and 6930(a), respectively. The Magistrate proposed a contrary conclusion, and plaintiffs now object.

As the Magistrate noted, 42 U.S.C. § 6925(a) prohibits the "treatment, storage or disposal" of hazardous waste subsequent to November 19, 1980, except in accordance with an operating permit from the Environmental Protection Agency ("EPA"). Magistrate's Report at p. 22. Citing *United States v. Waste Industries, Inc.*, 734 F.2d 159 (4th Cir. 1984), the Magistrate found that the leaching of hazardous waste from the Landfill constitutes "disposal" within the meaning of § 6925(a). Since the Landfill has produced leachate containing hazardous contaminants subsequent

to November 19, 1980, the City ordinarily would be required to obtain an operating permit from the EPA under the provisions of § 6925(a). It was undisputed in this proceeding that the City never applied to the EPA for such a permit, nor received from either the EPA or the State of Vermont a permit to store or dispose of hazardous waste.

The Magistrate found, however, that the City was not operating the Landfill in violation of § 6925(a) because it was operating the Landfill in complete compliance with the State of Vermont permit program which was authorized by the EPA pursuant to § 6926. The State obtained various phases of interim authorization and received final authorization from the EPA to run the program in January, 1985. The evidence at the preliminary injunction hearing showed that the City was not required to obtain a permit for the Landfill under the state's hazardous waste management program, which is run by the Agency of Environmental Conservation ("AEC"):

> The AEC's position is that only facilities presently handling hazardous wastes require a permit; those leaching hazardous waste [like the Landfill] do not. Mr. Maier [from the AEC] testified that he believed the State's interpretation is consistent with the federal regulations.

Magistrate's Report at p. 26.

Plaintiffs strenuously object to the conclusion that because the city is operating within Vermont's regulatory scheme, it is in compliance with § 6925(a). Plaintiffs claim that the State's hazardous waste permit program is inconsistent with the federal permit program, and that this Court should therefore find the City in violation of

§ 6925(a) as a matter of law. In particular, plaintiffs claim that by its failure to interpret the term "disposal" to mean movement of waste after it has been placed in a landfill, the AEC "tries to eliminate the 'leaking' of hazardous waste from RCRA's definition of disposal." Plaintiffs' Objections at p. 10. Citing *United States v. Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984), plaintiffs assert that the AEC thus "creates 'a gaping hole in the overall protection of the environment envisioned by Congress.' " *Id.*

Plaintiffs correctly point out that equivalency between a state program and the Federal program is one of the criteria that must be met before the EPA will authorize the state program to operate in lieu of RCRA's Hazardous Waste Management subchapter, 42 U.S.C. §§ 6921-6934. Contrary to plaintiffs' assertions, however, the overall regulatory scheme for protection of the environment envisioned by Congress clearly indicates that the determination of consistency between the federal scheme and Vermont's authorized program is one for the EPA, not the courts, to make. For instance, in order to obtain authorization for a state program, the state is to submit an application to the EPA, and after a preliminary indication of whether such program is expected to be approved and an opportunity to be heard, the EPA will publish findings regarding the suitability of the state program. 42 U.S.C. § 6926(b). The state program is authorized to operate in lieu of the Federal program under 42 U.S.C. §§ 6921-6934, including issuing permits for disposal of hazardous waste,

> *unless*, within ninety days following submission of the application the [EPA] Administrator notifies such State that such program may not be

> authorized, and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, [42 U.S.C. §§ 6921-6934]; (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

Id. (emphasis supplied). Similarly, after determining at a public hearing that a state is not administering and enforcing its authorized program in accordance with § 6926 and after notifying the state of the same, it is the EPA which shall withdraw authorization of the state program. 42 U.S.C. § 6926(e).

For these reasons, we hold that, given EPA's current authorization of Vermont's hazardous waste management program and Vermont's interpretation of the permit requirements, we cannot say at this stage of the proceedings that the City is violating § 6925(a).

Similarly, we hold that the City has not violated the notification requirements of 42 U.S.C. § 6930(a). Section 6930(a) provides that as of August 19, 1980,

> any person . . . operating a facility for the treatment, storage, or disposal of [hazardous waste] shall file with the Administrator (or with the States having authorized hazardous waste permit programs under Section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person . . . No identified or listed hazardous waste

> . . . may be transported, treated, stored or disposed of unless notification has been given as required under this subsection.

42 U.S.C. § 6930(a).

As the Magistrate stated, Vermont's EPA-authorized hazardous waste management program obviates the need for the City to file notification with the EPA; if notification need be filed, it should be filed with the State of Vermont. Magistrate's Report at 26. It is undisputed that the City never filed notification with Vermont. As with the permit requirements discussed above, the state is of the opinion that the notification requirement is prospective in nature and therefore does not apply to the City's pre-August 19, 1980 activities. Plaintiffs claim that the state's interpretation is inconsistent with the requirements of § 6930(a). If an inconsistency exists, however, it is a matter to be taken up by the EPA which, pursuant to 42 U.S.C. § 6926(e), may withdraw authorization of the State program after holding a public hearing. *See supra.* Accordingly, we hold that at this stage of the proceeding the City's failure to file a hazardous waste notification does not violate § 6930(a) of the RCRA.

B. Open Dump under RCRA – § 6945(a)

The Magistrate proposed that, while the Landfill was not an open dump, it was operating in violation of two open-dumping practices in violation of § 6945(a): the discharge of pollutants into waters of the United States without a National Pollutant Discharge Elimination Permit (which also constitutes the violation of the CWA, 33 U.S.C. § 1311, discussed below); and the generation of

explosive gases that exceed the lower explosive limit at the property boundary. *See* Magistrate's Report at p. 28-31. The Magistrate concluded, however, that the landfill was not an open dump because: (1) the Landfill was not included in an EPA-published inventory of all disposal sites or facilities which, pursuant to 42 U.S.C. § 6945(b), are open dumps for purposes of RCRA; and (2) the city has been operating under a Sanitary Landfill Certification issued by the State of Vermont on January 25, 1982 that specifically establishes a certification period of January 30, 1982 through January 30, 1987. Magistrate's Report at 27-28.

Plaintiffs object to the Magistrate's proposed conclusion that the Landfill is not an open dump. Section 6945 of RCRA and the regulations promulgated thereunder require either the upgrading of open dumps[1] to sanitary landfills by September 13, 1984 or, failing that, the closure of the open dump. Plaintiffs maintain that by permitting the Landfill the opportunity to operate and upgrade to a sanitary landfill after September 13, 1984, the State's certification "transgressed the five-year deadline mandated by Congress in 42 U.S.C. § 6945(a)." Plaintiffs Objections at p. 17.

An examination of the statutory scheme specified by Congress reveals that plaintiffs' assertion must fall. The five-year deadline established by Congress for converting open dumps to sanitary landfills, set forth in 42 U.S.C. § 6945(a), applies only to open dumps listed in the inventory described in § 6945(b).[2] Far from being "merely an administrative tool," Plaintiffs' Objections at p.3, the EPA inventory required under § 6945(b) is the mechanism mandated by Congress for determining whether a site is

an "open dump" for the purposes of the RCRA, including § 6945(a)'s five-year deadline for upgrading. *See* 42 U.S.C. § 6945(b). Because the Landfill is not on the EPA inventory of open dumps, and is currently operating under a Vermont Sanitary Landfill Certificate, we hold that the Landfill is not an open dump within the meaning of RCRA.

C. Point Source under CWA – § 1362(14)

Plaintiffs brought their CWA claim pursuant to 33 U.S.C. § 1365(a)(1), which provides for such actions against those who violate an effluent standard or limitation effective under the CWA. One such limitation prohibits "the discharge [into navigable waters of the United States] of any pollutant by any person." 33 U.S.C. § 1311(a). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Point source" is defined as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The Magistrate concluded, as does this Court, that the Landfill is in violation of § 1311(a) because it has, without a permit, discharged pollutants into navigable waters from a "point source," to wit, the railroad embankment culvert on the northern border of the Landfill. *See* Magistrate's Report at p. 40.

Plaintiffs challenge the Magistrate's proposed conclusion that, while the railroad culvert is a "point source" within the meaning of the CWA, the land mass constituting the Landfill itself is not. Plaintiffs' claim that the Landfill is: "essentially a container full of hazardous wastes"; "no different than a storage lagoon or huge

storage drum"; "like a vessel or other floating craft." Plaintiffs' Objections at pp. 22-23.

The Landfill may have certain characteristics in common with these conveyances; however, it is simply not one of them. The apposite caselaw is in accord. In *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642 (E.D.Pa. 1981), the court held that "the surface run-off of contaminated waters, *once channeled or collected*, constitutes discharge by a point source." *Id.* at 655 (emphasis supplied). In the absence of any "discernible, confined and discrete conveyance" creating such a channeling or collection device in the present case, we hold that the Landfill itself does not meet the definition of "point source" as set forth in 33 U.S.C. § 1362(14).

D. Imminent and Substantial Endangerment under RCRA – § 6972(a)(1)(B).

Plaintiffs next object to the Magistrate's proposed conclusion that there is not sufficiently persuasive evidence before the Court to hold that the Landfill "may present an imminent and substantial endangerment" to the environment. Plaintiffs have brought this citizen suit in part under 42 U.S.C. § 6972(a)(1)(B), which allows any person to sue an owner or operator of a landfill "which may present an imminent and substantial endangerment to health or the environment." Plaintiffs claim that there is sufficiently persuasive evidence, including the findings that the City is violating two open-dumping criteria in its operation of the Landfill, to conclude that the standard set forth in § 6972(a)(1)(B) has been met.

This Court cannot agree. Given the conflicting expert testimony regarding the imminent and substantial danger posed by the Landfill and the disputed reliability of other evidence presented at the hearing, which included bioassay results and water samples, this Court does not now have sufficiently persuasive evidence before it to hold that the Landfill may present an imminent and substantial danger to the environment.

IV. Conclusion

The remainder of plaintiffs' objections relate to their claim that the Magistrate's proposed relief is incommensurate with the environmental law violations committed by the City in its operations of the Landfill. While there is sufficient evidence at this preliminary stage of the proceeding to find the City in violation of 42 U.S.C. § 6945(a) and 33 U.S.C. § 1311(a), we are of the opinion that it would be inappropriate to enjoin operation of the Landfill until a trial on the merits. Even if the Landfill were closed, methane gas will continue to be generated by decomposing trash. Similarly, discharge of pollutants through the railroad culvert will not be stopped by closing the Landfill. Furthermore, since the commencement of this action the City has installed a gas ventilating system that appears to be effective in preventing methane gas from migrating off the Landfill and onto the plaintiffs' property. The city is also currently installing a leachate collection system which is designed to collect 80 to 90 percent of the leachate. Accordingly, we do not find it appropriate to order either immediate closure of the Landfill pending trial or any of the other injunctive relief

sought by plaintiffs based on the violations of 42 U.S.C. § 6945(a) and 33 U.S.C. § 1311(a).

The accompanying Order includes an order that the City cause the gas ventilating system and leachate collection system to become fully operational within sixty days. These preventive systems will alleviate serious problems that have impacted and will impact the surrounding environment. A determination of what, if any, further relief is appropriate must await a full trial on the merits.

ORDER

For the reasons set forth in the accompanying Opinion, IT IS HEREBY ORDERED that: (1) plaintiffs request for preliminary injunctive relief is DENIED and (2) the City cause the Landfill's gas ventilating system and leachate collection system to become fully operational on or before May 26, 1986 which is sixty days from the date of this Order.

SO ORDERED.

Dated at Rutland in the District of Vermont this 26th day of March, 1986.

/s/ Franklin S. Billings
Franklin S. Billings
District Judge

FOOTNOTES

[1] An open dump is defined as:

> any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under [42 U.S.C. 6944] and which is not a facility for the disposal of hazardous waste.

42 U.S.C. § 6903(14).

[2] Section 6945(a), entitled "Closing or upgrading of existing open dumps," provides:

> Upon promulgation of criteria under [42 U.S.C. § 6907(a)(3)], any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid wastes or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State *which are open dumps listed in the inventory under subsection (b) of this section* shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards.

42 U.S.C. § 6945(a)(emphasis supplied).

Section 6943(a)(3) provides that, at a minimum, a state solid waste management plan "shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements" of § 6945. *See* 42 U.S.C. § 6943(a)(3).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE and ROSE A. BESSETTE	:	Civil Action No. 85-269
v.	:	Filed
CITY OF BURLINGTON	:	February 5, 1987
CITY OF BURLINGTON	:	
v.	:	
GENERAL ELECTRIC COMPANY, INC., BLODGETT COMPANY, INC., EDLUND COMPANY, INC., E.B. & A.C. WHITING COMPANY and HAGAR HARDWARE COMPANY	:	

ORDER

I. Introduction

On October 30, 1986, United States Magistrate Jerome J. Neidermeier submitted to this Court a Report and Recommendation regarding the disposition of a number of motions in this case. First, the City of Burlington ("the City") has moved, pursuant to Fed.R.Civ.P. 19 and 21, to join as necessary and indispensable parties the companies named as third-party defendants in the third-party complaint: General Electric Company, Blodgett Company, Inc., Edlund Company, E.B. & A.C. Whiting Company, Inc., and Hagar Hardware Company ("third-party defendants"). Second, the third-party defendants, with the

exception of Edlund Company, Inc., have moved to dismiss the third-party complaint on several grounds. For the reasons stated in the discussion below, the Court adopts the Report and Recommendation of the Magistrate as to the City's Rule 19 motion and recommits to the Magistrate the third-party defendants' motions to dismiss.

II. City's Rule 19 Motion

The City has moved to join the third-party defendants under Rule 19 as necessary and indispensable parties. The City's argument is that plaintiffs, acting as private attorneys general pursuant to the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C.A. 6901, *et seq*, should not be allowed to pick and choose among potential defendants. The City argues that the third party defendants are ultimately responsible for whatever hazardous wastes might have been brought to the landfill and therefore must be parties to the lawsuit. Magistrate's Report and Recommendation, *Dague v. City of Burlington*, Civ. No. 85-269 (D.Vt. Oct. 30, 1986).

The Magistrate denied the motion, holding that third-party defendants are not indispensable parties under Rule 19. *Id.* at 3-4. He explained that Rule 19 provides that a party must be joined if "in his absence complete relief cannot be accorded among those already parties," Fed.R.Civ.P. 19(a)(1). "In this case, the City can provide all the relief that the plaintiffs seek: locating and removing all the hazardous waste at the landfill." Report and Recommendation, Oct. 30, 1986 at 3. The Magistrate added that the City actually seeks indemnification from

the third-party defendants and that is more properly the subject of a third-party action than of joinder of additional defendants in this case. *Id.*

As authority for his decision the Magistrate cites two cases. In *United States v. Price*, 523 F.Supp. 1055, 1075 (D.N.J. 1981) aff'd 688 F.2d 204 (3d Cir. 1982), an action was brought pursuant to RCRA § 7003, 42 U.S.C. § 6973 against the owners of a landfill for injunctive relief to remedy hazards created by chemical dumping. The owners moved to compel the joinder of the chemical companies that deposited waste in the landfill and the transporters that hauled the waste. Although the *Price* court "agree[d] with defendants that equitable considerations support the addition of the generators and transporters as defendants." it denied the motion.

> The traditional rule is that one tort feasor may not compel the joinder of other alleged joint tortfeasors. 7 Wright & Miller, [Federal Practice and Procedure] at § 1623. Rule 19 did not depart from that long-established principle. Advisory Committee's Note to Rule 19, 39 F.R.D. 89, 91 (1966); *see American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244-45 n. 42 (3d Cir. 1975); *Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1970).

523 F.Supp. at 1075. In *United States v. Conservation Chemical Co.*, 589 F.Supp. 59 (W.D.Mo. 1984) the Court, citing *Price* with approval, denied defendant waste-generators' motion to dismiss because the plaintiff had failed to join other contributing waste-generators. *Id.* at 63. The court noted that other waste generators might be permissive parties who could be joined, pursuant to Rule 20, at the

plaintiff's option *Id.* Such parties were not, however, necessary or indispensable.

Agreeing with the analysis in the two cases discussed, the Magistrate denied the City's Rule 19 motion. The City did not object to the Magistrate's Report and Recommendation.

The Magistrate's analysis is sound, and we adopt it. The City's Rule 19 motion is DENIED.

III. Third-Party Defendants' Motion to Dismiss

Before the Magistrate, third party defendants moved to dismiss the third-party complaint. The Magistrate discussed the motions and recommended that they be denied. Report and Recommendation, October 30, 1986 at 6-12. Third-party defendants, with the exception of Blodgett Company, Inc., have filed objections to the Magistrate's Report and Recommendation. In these objections and the memoranda filed in support thereof, third-party defendants have both clarified the grounds for their initial motions to dismiss and raised additional challenges concerning standing.

There are now essentially five grounds claimed by third party defendants for dismissal:

(1) that the original plaintiffs lack standing;

(2) that the City lacks standing to bring the third-party complaint;

(3) that the plaintiff's notice to the City in the original action was inadequate;

(4) that the City's notice to third-party defendants was inadequate; and

(5) that the City has failed to state a claim upon which relief can be granted against third-party defendants in that there is no right to indemnification under RCRA.

The City has filed neither its own objections to the Magistrate's Report and Recommendation nor any response to the third-party defendants' objections. The City's initial Memorandum in Opposition to Motion to Dismiss addressed only the notice issues raised by third-party defendants. It is now clear that third-party defendants raise additional grounds for dismissal which apparently were not fully briefed and argued before the Magistrate. Pursuant to 28 U.S.C. § 636(b)(1), therefore, the matter is recommitted to the Magistrate for additional briefing and consideration of the third-party defendants' motions to dismiss.

The City's Rule 19 motion is DENIED. The third-party defendants' motions to dismiss are recommitted to the Magistrate for additional consideration.

SO ORDERED

Dated at Rutland in the District of Vermont this 5th day of February, 1987.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

Ernest DAGUE, Sr., Ernest Dague, Jr., and Betty Dague

v.

CITY OF BURLINGTON.

Civ. No. 85-269.

United States District Court,

D. Vermont.

Oct. 16, 1989.

FINDINGS OF FACT, OPINION AND ORDER

BILLINGS, Chief Judge.

Plaintiffs bring this action against the City of Burlington ("City") for alleged violations of state and federal law arising out of the operation of the Burlington Municipal Disposal Grounds ("Landfill"). Plaintiffs allege that the operation of the Landfill has generally harmed the environment, and has specifically damaged their adjoining properties, by the generation of methane gas, windblown debris and hazardous waste. The ten-count complaint seeks injunctive relief, imposition of civil penalties, compensatory and punitive damages, costs and attorney's fees.

Trial by court was held during the period of May 8-11, 1989 on defendant's statutory liability, and plaintiffs' relief, if any, under Counts I through V of the complaint. These counts are brought pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 (Counts I-III); the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (Count IV); and the Vermont Groundwater Protection Law, 10 Vt.Stat.Ann. § 1410 (Count V). Liability under the remaining common law claims, Counts VI through X, and the issue of damages, will be tried by jury at a later date.

For purposes of this Opinion, we presume familiarity with prior Opinions, Orders, and Reports and Recommendations in this case.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint in this matter on October 9, 1985. The case was initially referred to the Hon. Jerome J. Niedermeier, United State Magistrate for the District of Vermont, to hear and determine plaintiffs' motion for a preliminary injunction. Plaintiffs were seeking immediate closure of the Landfill. The Magistrate heard oral arguments on the motion for a preliminary injunction on October 28, 1985, at which time the City also moved to dismiss the complaint. Several more hearings were held between November 1985 and January 1986 on plaintiffs' motion for preliminary injunction and the City's motion to dismiss.

In February of 1986, the Magistrate issued a Report and Recommendation finding, for the purpose of the

motion for a preliminary injunction, that the City was in violation of RCRA, 42 U.S.C. § 6945(a), and the CWA, 33 U.S.C. § 1311(a). However, the Magistrate recommended that the Court deny plaintiffs' motion at that time and order the City to take certain specific steps toward remedying the violations. This Court adopted the Magistrate's Report and Recommendation *in toto*. Accordingly, we denied plaintiff's motion for a preliminary injunction and ordered the City, within sixty days, to make fully operational both a gas ventilation system and a leachate collection system for the Landfill. The City complied with the Court's Opinion and Order, dated March 26, 1986.

Early in this case, the City also filed third-party complaints against several other parties. The City subsequently attempted to join these third-party defendants as co-defendants. Meanwhile, the third-party defendants sought to dismiss the third-party complaints or, alternatively, to sever the third-party action from the primary case. On February 7, 1987 and September 3, 1987, respectively, the Court denied the City's motion to join defendants and granted the third-party defendants' motion to dismiss. The City sought, but was denied, certification from the Court to allow appeal of this decision as a final partial judgment.

On May 19, 1988, the Court granted the City's motion to separate the statutory claims for trial by court, from the common law claims and damages for trial by jury. Thereafter, cross motions for summary judgment and partial summary judgment, as well as motions on evidentiary matters, were heard and decided by the Court. By the spring of 1989, discovery was completed and the court claims were scheduled for trial.

At the close of the trial, on May 11, 1989, the Court allowed the parties until June 16, 1989 to file proposed findings of fact and conclusions of law. Plaintiffs filed memoranda in this regard on June 16, 1989; defendant filed its memoranda on June 19, 1989.

FINDINGS OF FACT

Prior to the commencement of trial, plaintiffs filed a stipulation of facts, document # 204, a copy of which is attached as Appendix A. At trial, the parties agreed to incorporate the stipulations into the record, with a modification of Stipulation # 13. Accordingly, the Court incorporates herein the facts stipulated by the parties (hereinafter "Stipulations"), except that Stipulation # 13 now reads:

13. The Landfill is a highly saturated area.

In consideration of the evidence presented at trial, the exhibits and the parties' proposed findings, the Court adds the following facts:

The State of Vermont has authorization from the United States Environmental Protection Agency (EPA), pursuant to 42 U.S.C. § 6926, to operate its own solid and hazardous waste program; the State obtained various phases of interim authorization beginning in 1982, and received final authorization in January 1985. Under state statute, the legislature has delegated responsibility for the administration of Vermont's hazardous waste, solid waste and water control laws to the Secretary of the Agency of Natural Resources (formerly the Agency of

Environmental Conservation). The current Secretary, Jonathan Lash, has delegated some of this responsibility to the Commissioner of the Department of Environmental Conservation, but remains ultimately in charge of these programs.

The State takes the position that the Burlington Landfill is a solid waste landfill, not a hazardous waste storage or disposal facility. Accordingly, the State does not require the City to have a hazardous waste permit to operate the Landfill.

The January 31, 1985 Assurance of Discontinuance[1] was filed with the Chittenden Superior Court and was entered as an Order of that court on March 7, 1985. On December 18, 1985, the State of Vermont brought an action against the City in Chittenden Superior Court to enforce the March 7 Order. The State sought compliance with the provisions requiring the City to install a leachate collection system by September 1, 1985, and a methane control system by December 2, 1985. These systems did not become operational until March of 1986.

The January 31, 1985 assurance also imposed a closure option on the City – either choose another landfill site and close the Burlington Landfill by January 1, 1988, or begin operating a resource recovery facility (RRF) and close the Landfill by January 1, 1990.

The City never notified the State in writing of its choice of the two closure options despite its obligation to

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[1] *See* Stipulation # 109.

do so in writing.[2] The City's Board of Aldermen did, however, adopt a resolution to pursue the RRF option. During the period from 1980 through early 1983, the City developed plans to construct a composting and recycling facility, with the State's cooperation and approval. As a result, the January 1990 closure date became effective. Subsequently, the Mayor of Burlington vetoed the aldermanic resolution electing the RRF option.

In addition to the various assurances of discontinuance and amendments thereto entered into by the City and the State, the City also received Transitional Operational Authority (TOA) from the State to operate the Landfill. The State granted the City such authority by letter dated July 31, 1987.[3] The State has also performed its own environmental assessment of the Landfill.

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[2] *See* Stipulation # 116.

[3] The letter from the State's Department of Environmental Conservation to the City of Burlington, granting transitional authorization for the operation of the Landfill Pursuant to Act 78, states in pertinent part:

> Transitional Authorization is hereby granted City of Burlington for continued operation of Burlington Landfill in accord with the previously issued Assurance of Discontinuance by this Agency. Transitional Operation Authority will remain in force until a comprehensive review of the facility required by 10 V.S.A. Section 6605a has been completed and until a decision regarding recertification of the facility under new standards required by the Act has been made.
>
> Act 78 of the 1987 Legislative Session requires comprehensive assessment of all disposal facilities in

(Continued on following page)

Secretary Lash testified that the State conducted substantial monitoring and testing of the area in and around the Landfill, particularly the Intervale, during the years 1985 and 1986. The State collected both leachate data and biological data. As a result of its investigation, the State concluded that the Landfill did not, at that time, present an imminent and substantial endangerment to human health or the environment. However, the State also determined that January 1, 1990 was an appropriate closure date in view of the environmental concerns presented by the Landfill. According to Secretary Lash, the State still intends to enforce the January 1, 1990 closure date.

Craig Heindel, a hydrogeologist with the firm of Wagner, Heindel & Noyes, conducted studies of the surface water and groundwater flow regime in and around the Landfill. According to his studies, the flow of groundwater and surface water in the vicinity of the Landfill is horizontally from south to north. It is highly unlikely that any groundwater flows in a southerly direction beneath the Landfill.

The soils beneath the Landfill have very low permeability. There is a slight downward vertical flow beneath the Landfill, a downward flow under the railroad

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(Continued from previous page)

> Vermont by July 1, 1990. Burlington Landfill has been placed on the higher priority assessment list, based on information in the Solid Waste Management Section files. Assessment of all disposal facilities on the high priority list as required by 10 V.S.A. Section 6605a will be completed prior to December 31, 1988.

embankment, and a strong upward flow immediately north of the embankment. As a result, the groundwater entering the Landfill from the south, and any groundwater originating in the Landfill, flows northward and discharges into the very upper layers of the cattail marsh, immediately north of the railroad embankment.

Heindel also studied the input of water into the Intervale from various sources, including the Landfill. On average, approximately 500,000 to 600,000 gallons of water enter the Intervale per day. Of this, an average, of 1,000 gallons is groundwater from the Landfill. Other sources of water include precipitation, periodic flooding from the Winooski River, storm water discharges from the street drainage system and groundwater from Burlington's "north end," and rain water draining off the beltline highway which runs along side Intervale.

The tests conducted by the engineering firm of O'Brien & Gere reveal the presence of chemical contaminants in the groundwater and surface water north of the Landfill.[4] Data from the O'Brien & Gere Report (Plaintiffs' Exhibit 51), as well as data processed by the City of Burlington and the State of Vermont, were summarized by plaintiffs' expert, Frank Reed, and introduced into evidence at trial (Plaintiffs' Exhibit 84).

Except for one test well located approximately 1,500 feet north of the Landfill, the test wells around the Landfill have generally shown lead concentrations well below

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[4] *See* Stipulations # 28-32 and Plaintiffs' Exhibit 51.

50 parts per billion.[5] Although on isolated occasions lead concentrations of these wells have exceeded this level, the average concentrations of lead remain below. Similarly, the data derived from testing the leachate has shown lead concentrations ranging from less than 2 parts per billion in April 1986 to 14.7 parts per billion in June 1986. The last recorded data on the leachate, for tests done in November 1988, show a lead concentration of 5 parts per billion.

One groundwater test well located approximately 1,500 feet north of the Landfill (identified as well 84-4) showed increasing levels of lead since June 1987, reaching a level of 73 parts per billion in November 1988.

The leachate collection system installed by the City is approximately 90% effective. Leachate escaping the collection system moves into the groundwater and generally flows northward, emerging just beyond the railroad embankment. Most of this leachate discharges into the shallow groundwater or surface water in the Intervale, within approximately 100 to 300 feet north of the railroad embankment. Leachate from the Landfill is contaminated with hazardous pollutants. The fact that leachate from the Landfill is toxic to the fathead minnow. Daphnia (water flea)[6] demonstrates that the leachate can kill a vertebrate in the food chain.

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[5] Pursuant to 40 C.F.R. § 257.3 – 4(c)(2)(i) and Appendix I thereto, the maximum contaminant level of lead permitted by the EPA is 50 parts per billion.

[6] *See* Stipulation # 36 and # 37.

DISCUSSION

Counts I and II

Plaintiffs' Counts I and II are brought pursuant to the citizen suit provision of RCRA, which provides in pertinent part:

> . . . any person may commence a civil action on his own behalf –
>
> . . . against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter;
>
> . . . .

42 U.S.C. § 6972(a)(1)(A).

Plaintiffs' Count I alleges violations of RCRA's permit and notification requirements, 42 U.S.C. §§ 6925(a) and 6930(a), Count II alleges violations of RCRA's prohibition on open dumping. 42 U.S.C. § 6945(a).

1. Permit and notification requirements under RCRA

Plaintiffs' Count I, brought pursuant to 42 U.S.C. § 6972(a)(1)(A), alleges violations of the permit and notification requirements set forth in 42 U.S.C. §§ 6925(a) and 6930(a). Subsection 6925(a) requires owners and operators of hazardous waste facilities, existing as of

November 19, 1980, to obtain an operating permit from the EPA.[7] Similarly, § 6930(a) requires such owners and operators to file with the EPA or the State written notification of its hazardous waste activities.[8] It is undisputed

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[7] Subsection 6925(a) states:

> (a) Permit requirements
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> Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit.

[8] Subsection 6930(a) states:

> (a) Preliminary notification
>
> Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. . . .

that the City never obtained a permit from the EPA or the State, in connection with its operation of the Landfill. As a threshold matter, however, we must determine whether and to what extent the City was bound by the requirements set forth in §§ 6925(a) and 6930(a).

RCRA allows states to obtain authorization from the EPA to administer their own programs for hazardous waste management. 42 U.S.C. § 6926(b). The EPA will authorize a state program if it meets the following criteria: (1) it is equivalent to the federal program under RCRA; (2) it is consistent with the federal program and other authorized state programs; and (3) it provides adequate enforcement of compliance with RCRA Subchapter III. *Id*. As we stated in our opinion dated March 26, 1986, "the determination of consistency between the federal scheme and Vermont's authorized program is one for the EPA, not the courts, to make."

Pursuant to 42 U.S.C. § 6926(e), the EPA also has the power to withdraw its authorization of a state program if it follows certain procedures, including a public hearing on the matter. Plaintiffs contend that, pursuant to 42 U.S.C. § 6972(a)(1)(A), they may directly challenge the City's operation of the Landfill without first having to seek withdrawal of the State's EPA authorization. In other words, plaintiffs argue that § 6972(a)(1)(A) allows them to bring this action against the City for violating § 6925(a) and § 6930(a) regardless of whether the State has EPA authorization and regardless of whether they have sought withdrawal of the State's EPA authorization. We disagree.

Once a state has obtained EPA authorization, its hazardous waste program operates in lieu of RCRA's Subchapter on Hazardous Waste Management, 42 U.S.C. §§ 6921-6934. 40 C.F.R. § 271.3(b). As was recently stated in *Williamsburgh-Around-the-Bridge Block Association, et al. v. Jorling, et al.*, No. 89-CV-471, slip op. at 10, 1989 WL 98631 (N.D.N.Y. August 21, 1989) "[b]y their own terms, the hazardous waste regulations promulgated under RCRA applicable to owners and operators do not apply in states with their own RCRA hazardous waste programs." The regulatory requirements under RCRA are superseded by state regulations in those states having EPA authorization. *See Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C.1987). Therefore, a plaintiff seeking to challenge the operation of a hazardous waste site in an EPA authorized state may bring an action under state law, not federal law, or may seek revocation of the EPA's authorization; a direct action to enforce the RCRA permit requirement under § 6925(a) is not available.

The State of Vermont has an EPA authorized hazardous waste program pursuant to 42 U.S.C. § 6926. The State obtained various phases of interim authorization beginning in 1982, and received final authorizations from the EPA in January of 1985. By granting Vermont final authorization, the EPA implicitly determined that Vermont's program was equivalent to the federal program, consistent with federal and state programs in other states, and adequate in its enforcement mechanisms.

The Vermont Agency of Natural Resources administers the state programs, as authorized by the EPA. The state program operates in lieu of the federal program. The State does not require the City to obtain a federal

permit under 42 U.S.C § 6925(a), nor is such a requirement imposed under 42 U.S.C. § 6972(a)(1)(A). Plaintiffs, therefore, have failed to prove the City in violation of the permit requirements of 42 U.S.C. § 6925(a).

Similarly, the City has not violated the notification requirements of 42 U.S.C. § 6930(a). Pursuant to this subsection, any person, as of August 19, 1980, " . . . owning or operating a facility for treatment, storage, or disposal of [hazardous waste] shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person." 42 U.S.C. § 6930(a).

As noted earlier, the City has never filed notification with the EPA under § 6930(a). As indicated by the language of the statute, however, Vermont's authorization from the EPA for its hazardous waste program obviates the need for the City to file with the EPA pursuant 42 U.S.C. § 6930(a). Such notification, if required by the State, would have to be filed with the State, not the EPA. The State takes the position that the notification requirement in § 6930(a) does not apply to the City's pre-August 19, 1980 activities because the statute is prospective in nature. To the extent that plaintiffs dispute this position, they may seek recourse with the EPA, which has the power to revoke the State's authorization under 42 U.S.C. § 6926(e). In this action, however, we do not find the City in violation of the notification requirements of subsection 6930(a) because we think the federal provision is, in this instance, superseded by state law.

2. *Prohibition on open dumping under RCRA*

Plaintiffs bring Count II of the complaint pursuant to 42 U.S.C. § 6972(a)(1)(A) on grounds that the City has been engaging in open dumping of solid and hazardous waste, as prohibited under 42 U.S.C. § 6945(a)[9] and regulations set forth in Part 257 of title 40 of the Code of

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[9] Subsection 6945(a) states:

(a) Closing or upgrading of existing open dumps

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

Federal Regulations. Section 257.3-1 through 257.3-8 of C.F.R. title 40 contains certain criteria for classification of solid waste disposal facilities and practices; practices that fail to satisfy these criteria constitute open dumping, and violate 42 U.S.C. § 6945(a). 40 C.F.R. § 257.1(a)(2).

Specifically, plaintiffs allege the following three practices violate the open dumping provisions of RCRA: (a) the generation of methane gas in concentrations above the safety limit set forth at 40 C.F.R. § 257.3-8(a)(2); (b) the discharge of pollutants into waters of the United States in violation of the surface water criterion set forth at 40 C.F.R. § 257.3-3(a); and (c) the contamination of an underground drinking water source beyond the Landfill boundary in violation of 40 C.F.R. § 257.3-4(a).

a. Generation of methane gas

Plaintiffs allege that in the past the Landfill generated methane gas in concentrations exceeding the safety criterion in 40 C.F.R. § 257.3-8(a)(2), in violation of 42 U.S.C. § 6945(a). It is undisputed that prior to December 27, 1985, test wells near the Landfill, including some on the plaintiffs' property, showed concentrations of methane gas exceeding the so-called "lower explosive limit" in force under RCRA for methane gas concentrations.[10]

In earlier proceedings on plaintiffs' motion for a preliminary injunction, the City disputed the fact that the Landfill caused the pre-December 27, 1985 occurrence of methane gas at the sites around the Landfill. However,

[10] *See* Stipulations #78-#96.

we adopted the Magistrate's finding that such a causal connection did exist. We concluded, at that time, that the City was in violation of this open dumping prohibition. We again hold that until December 27, 1985, the Landfill was producing methane gas in concentrations exceeding the lower explosive limit of RCRA, in violation of the prohibition on open dumping practices under 42 U.S.C. § 6945(a).

Sometime in December 1985, the City began installing the gas ventilation system at the Landfill. On March 26, 1986 we ordered the City to make the system fully operational within sixty days. About that time, the system did become fully operational. Since then, the gas ventilation system installed by the City has substantially alleviated the methane gas problem caused by the Landfill. The monitoring test wells, which before December 27, 1985 showed concentrations of methane gas above RCRA's lower explosive limit, have since then consistently shown methane gas concentrations below the lower explosive limit.[11] Thus, we conclude that since December 27, 1985, the City has not violated 40 C.F.R. § 257.3-8(a)(2).

b. Discharge of pollutants into waters of the United States

This open dumping issue, raised pursuant to 40 C.F.R. § 257.3-3(a), is directly related to plaintiffs' Count IV claim that the City is discharging pollutants into water of the United States in violation of the National Pollutant

[11] *See* Stipulation #96.

Discharge Elimination System (NPDES) of the Clean Water Act (CWA), 33 U.S.C. §§ 1311 and 1342. Proof of such unauthorized discharging of pollutants, in violation of 33 U.S.C. §§ 1311 and 1342, *ipso facto* establishes a violation of the surface water criterion of RCRA, 40 C.F.R. § 257.3-3(a). *See O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 655 (E.D.Pa.1981).

We incorporate herein our discussion of Count IV below. On the basis of our conclusion that the City is violating the CWA, 33 U.S.C. §§ 1311 and 1342, we hold that the City is engaging in the open dumping practice prohibited under 40 C.F.R. § 257.3-3(a), in violation of 42 U.S.C. § 6945(a).

c. Contamination of an underground drinking water source

Plaintiffs also contend that the Landfill is contaminating an underground drinking water source beyond the boundaries of the Landfill, in violation of 40 C.F.R. § 257.3-4(a). Specifically, plaintiffs allege that the Landfill is causing an occurrence of lead in concentrations that exceed the maximum levels permitted under RCRA. This is the third form of an open dumping practice alleged by plaintiffs.

Pursuant to 40 C.F.R. § 257.3-4(c)(2)(i) and Appendix I thereto, the maximum contaminant level of lead allowed by the EPA is 50 parts per billion. According to the data compilations provided by plaintiffs' expert, the concentration of lead found in the leachate, and all but one of the test wells north of the Landfill, remained generally below this limit.

One test well located approximately 1,500 feet to the north of the Landfill (identified as well 84-4) did show significantly higher levels of lead in the groundwater, reaching a level of 73 parts per billion in November 1988. While this level clearly exceeds the federal limit of 50 parts per billion, there are many other potential sources of contaminants that may have contributed to the amount of lead detected at well 84-4. The test data shows that several wells located in the area between the Landfill and site 84-4 revealed much lower concentrations of lead than well 84-4. The evidence also indicates that leachate from the Landfill discharges into the surface water or groundwater within 100 to 300 feet north of the railroad embankment, and migrates northward at a very slow rate, if at all. Plaintiffs have not provided any direct evidence to show that the Landfill has caused the occurrence of lead at well 84-4.

Thus, there is insufficient evidence to find that the Landfill is the sole or primary source of lead occurring at well 84-4. Accordingly, we hold that plaintiffs have not met their burden of proof on their claim of open dumping in violation of 40 C.F.R. § 257.3-4(a).

Count III

Plaintiffs bring Count III of the complaint on grounds that the City, as an owner and operator of a disposal facility, has contributed in the past, and is contributing at present, to the storage, treatment or disposal of solid or hazardous wastes which may present an imminent and substantial endangerment to the public's health and the

environment. Upon determining that such an endangerment exists, the Court is authorized to order such action by the City as may be necessary to abate the endangerment. 42 U.S.C. § 6972(a)(1)(B).[12]

We considered this claim in connection with plaintiffs' earlier motion for a preliminary injunction, which we decided March 26, 1986. At that time we agreed with the Magistrate's conclusion that the evidence was insufficient to support a finding that the Landfill may present an imminent and substantial endangerment to health or the environment. Our decision was based upon the conflicting nature of the opinions presented by plaintiffs' expert, Frank Reed, and the defendant's expert, William Countryman.

Both Dr. Reed and Mr. Countryman have advanced degrees in fields related to environmental studies; they

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12 Subsection 6972(a)(1)(B) states:

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

. . . .

[(1)](B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; . . .

have taught at academic institutions and have engaged in private environmental consulting. Both were qualified as experts and testified at trial.

Dr. Reed has a master's degree in biology and a Ph.D. in ecology. He testified at trial that his opinion was based on, among other things: site visits in 1985 and in April and May of 1989; studies of the Landfill including the O'Brien & Gere report and the Wagner, Heindel & Noyes study; data compiled by the City and State from water samples taken in and around the Burlington Landfill; the 167 stipulated facts in this case; and various state, federal and international regulatory standards including EPA groundwater and human health standards.

Dr. Reed visited the Landfill on several occasions in 1985 and 1989, in connection with this lawsuit. Some of the visual characteristics that he looked for in conducting his site visits included evidence of seeps, differences in the quality and quantity of vegetation present on the north and south sides of the railroad embankment, visual signs of stress on the vegetation and signs of animal activity.

Dr. Reed noted in testimony, however, that looking for visual signs of stress alone may be insufficient to assess the possible endangerment to a particular ecological system. Where, as in the case of a cattail marsh, the climax system has a high tolerance for toxic chemicals, it may only show signs of stress at a latent stage of deterioration. Dr. Reed testified, "[t]he visual deterioration of those kinds of systems occurs quickly, and it's long past the point at which you can begin to think of saving the system." Accordingly, his opinion was also based upon

analysis of chemical data derived from the groundwater and surface water in and around the Landfill, and tests of the leachate.

Dr. Reed's opinion is that "the Burlington Landfill definitely presents an imminent and substantial endangerment to the environment." His opinion at trial differed from his earlier opinion given in connection with plaintiffs' motion for a preliminary injunction. At that time, Dr. Reed testified that the Landfill "may" present an imminent and substantial endangerment to the environment.

Mr. Countryman, who has a master's degree in zoology, also conducted site visits in connection with this lawsuit and, in the 1970s, did some unrelated work at the Landfill. The bases of his opinion included: his observations at the Landfill, the stipulation of facts, general discussions with City officials, testimony presented at the preliminary injunction hearing and information he had concerning the concentrations of various contaminants in the water. In his opinion, the Landfill does not present an imminent or substantial endangerment to health or the environment.

While we do not question Mr. Countryman's expertise in the field, we note that he testified that he would want to see "evidence of stress" before rendering an opinion as to whether there was an imminent and substantial endangerment to the environment. In other words, defendant's expert would require some form of actual harm before determining that there may be an imminent and substantial endangerment to the environment. However, we hold that a finding of imminent and

substantial endangerment does not require actual harm. *See United States v. Vertac Chemical Corp.*, 489 F.Supp. 870, 885 (E.D.Ark.1980). Because the standard applied by defendant's expert was more stringent than is legally required, we think his opinion is not persuasive in this instance.

Even though the leachate collection system is approximately 90% effective, hazardous wastes are still being discharged into the soil, groundwater and surface water in and around the Landfill. Leachate escaping from the Landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA.[13] The testimony by Secretary Lash also revealed that the State concluded that January 1, 1990 would be an appropriate closing date in view of the State's independent environmental investigation in and around the Landfill. On the basis of these facts and other evidence in this case such as Dr. Reed's expert opinion, we find that the Landfill is now in violation of 42 U.S.C. § 6972(a)(1)(B), as it may present an imminent and substantial endangerment to health or the environment.

Count IV

Count IV of the complaint is brought pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. The CWA provides for citizen suits against those who violate the Act's effluent standards or limitations. 33 U.S.C.

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[13] *See* Stipulations #29-#33.

§ 1365(a)(1).[14] Plaintiffs specifically allege the City's operation of the Landfill violates the limitation set forth in 33 U.S.C. § 1311(a), which prohibits "the discharge of any pollutant by any person," unless authorized under the CWA. Such authorization would exist if defendant had obtained a permit for the discharge of pollutants, consistent with the requirements of 33 U.S.C. § 1342. The city has no such permit.

Almost all of the requirements of a subsection 1311(a) violation are evident in the facts, without substantial dispute. The term "discharge of a pollutant" includes the addition of any pollutant or combination of pollutants to waters of the United States from any point source. 33 U.S.C. §§ 1362(12) and 1362(7); 40 C.F.R. § 122.2 "Pollutant" is defined to include, among other things, "chemical wastes." 33 U.S.C. § 1362(6). Water samples taken in and around the Landfill indicate the presence of various chemical wastes specifically listed as toxic pollutants

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[14] Subsection 1365(a)(1) states:

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, . . .

under 40 C.F.R. § 401.15.[15] The area adjacent to and north of the Landfill, known as the Intervale, is a wetland and constitutes "waters of the United States" as that term is broadly defined under 40 C.F.R. § 122.2. Finally, since the City has not received a permit from either the EPA or the State of Vermont, the City is not authorized to discharge pollutants into the Intervale under the CWA, 33 U.S.C. § 1342.

The last remaining question raised by plaintiffs' CWA claim is whether or not the City has been discharging pollutants into waters of the United States "from any point source." "Point source" refers to: " . . . any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged . . . [but] does not include return flows from irrigated agriculture." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. The term "point source" is to be broadly interpreted. As stated by the Tenth Circuit:

> The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing *the broadest possible definition of any identifiable conveyance* from which pollutants might enter the waters of the United States.

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[15] *See* Stipulations #29-#33.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir.1979) (emphasis added).

The culvert, through which water flows from the Landfill into the Intervale, may accurately be characterized as a "discernible, confined and discrete conveyance," and as such it is a "point source." It is irrelevant that the City does not own the land on which the culvert is located, as the statute broadly proscribes discharge from *any* point source. *See United States v. Velsicol*, 438 F.Supp. 945, 947 (W.D.Tenn.1976). For the reasons stated, we hold that the City's operation of the Landfill, without a permit issued pursuant to 33 U.S.C. § 1342, violates the Clean Water Act, 33 U.S.C. § 1311(a).

Count V

Count V of plaintiffs' complaint is brought pursuant to the Vermont Groundwater Protection Law, 10 Vt.Stat.Ann. § 1410(c), for equitable relief from alleged unreasonable harm caused by the city in altering the character and quality of the groundwater beneath and around the Landfill.

The Vermont Groundwater Protection Law reads as follows:

§ 1410. Groundwater; right of action

(a) Findings and policy. The general assembly hereby finds and declares that:

(1) surface and subsurface water are inherently interrelated in both quality and quantity;

(2) groundwater hydrology is a science that allows groundwater quality and quantity to be mapped and forecast;

(3) groundwater is a mobile resource that is necessarily shared among all users;

(4) all persons have a right to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons; and

(5) it is the policy of the state that the common-law doctrine of absolute ownership of groundwater is hereby abolished.

(b) Definitions.

(1) "Groundwater" means water below the land surface.

(2) "Surface water" means any water on the land surface.

(3) "Person" means any individual, partnership, company, corporation, association, unincorporated association, joint venture, trust, municipality, the state of Vermont, or any agency, department or Subdivision of the state, federal agency, or any other legal or commercial entity.

(c) Any person may maintain under this section an action for equitable relief or an action in tort to recover damages, or both, for the unreasonable harm caused by another person withdrawing, diverting or altering the character or quality of groundwater.

(d) Notwithstanding the provisions of subsection (c) of this section, a person who alters groundwater quality or character as a result of agricultural or silvicultural activities, or other activities regulated by the commissioner of the department of agriculture, shall be liable only if

the alteration was either negligent, reckless or intentional.

(e) Factors to be considered in determining the unreasonableness of any harm referred to in subsection (c), above, shall include, but need not be limited to, the following:

(1) the purpose of the respective uses or activities affected;

(2) the economic, social and environmental value of the respective uses, including protection of public health;

(3) the nature and extent of the harm caused, if any;

(4) the practicality of avoiding the harm, if any;

(5) the practicality of adjusting the quantity or quality of water used or affected and the method of use by each party;

(6) the maintenance or improvement of groundwater and surface water quality;

(7) the protection of existing values of land, investments, enterprises and productive uses;

(8) the burden and fairness of requiring a person who causes harm to bear the loss; and

(9) the burden and fairness of requiring a person to bear the loss, who causes harm in the conduct of reasonable agricultural activities, utilizing good agricultural practices conducted in conformity with federal, state and local laws and regulations.

(f) Nothing in this section shall be construed to preclude or supplant any other statutory or common-law remedies.

10 Vt.Stat.Ann. § 1410.

In view of our findings, we conclude that leachate, which contains hazardous chemicals and is toxic to some forms of aquatic life, continues to flow into groundwater beneath and north of the Landfill. This contamination constitutes an alteration of the character and quality of the groundwater, and in consideration of the nine factors set forth above, unreasonably harms the beneficial use and enjoyment of the groundwater by other persons. Therefore, we hold that the City has been operating the Landfill in violation of 10 Vt.Stat.Ann. § 1410.

Pursuant to § 1410(c), "any person" may maintain an action for equitable relief from a violation of this statute. Plaintiffs, therefore, have standing to pursue this claim. Plaintiffs are entitled to equitable relief as provided below. They are further entitled to pursue their claims in tort, and to seek damages in a later trial by jury.

CONCLUSION

For the foregoing reasons, the Court concludes the following:

1. Defendant City of Burlington has not violated 42 U.S.C. § 6925(a) or 42 U.S.C. § 6930(a) as alleged in Count I of plaintiffs' complaint.

2. As to plaintiffs' Count II, alleging three separate open dumping practices in violation of 42 U.S.C. § 6945(a): (a) the City was generating methane gas, in violation of 40 C.F.R.

§ 257.3-8(a)(2), but abated that practice on or about December 27, 1985, and since then has not violated this provision; (b) the City continues to discharge pollutants into water of the United States without a permit, in violation of 40 C.F.R. § 257.3-3(a); and (c) the City has not contaminated an underground drinking water source beyond the Landfill boundary, in violation of 40 C.F.R. § 257.3-4(a).

3. The Landfill may present an imminent and substantial endangerment to health or the environment, and therefore its continued operation violates 42 U.S.C. § 6972(a)(1)(B), as alleged in Count III of plaintiffs' complaint.

4. The City is violating the Clean Water Act, 33 U.S.C. § 1311 by discharging pollutants into the Intervale without authorization, as alleged in Count IV of plaintiffs' complaint.

5. The City is violating Vermont's Groundwater Protection Law, 10 Vt.Stat.Ann. § 1410, by altering the character and quality of the groundwater beneath and north of the Landfill, as alleged in Count V of plaintiffs' complaint.

In view of the statutory violations found, and pursuant to the Court's enforcement powers under 42 U.S.C. § 6972(a)(1), 33 U.S.C. § 1365(a) and 10 Vt.Stat.Ann. § 1410(c), the City is hereby ordered to close the Landfill on or before January 1, 1990. Civil penalties shall not be imposed pursuant to 42 U.S.C. § 6928(g) or 33 U.S.C. § 1319(d). Having determined that plaintiffs have substantially prevailed in both their RCRA amd [sic] CWA claims, the Court orders defendant to pay the costs of litigation,

including reasonable attorney and expert witness fees, to be assessed. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

SO ORDERED.

APPENDIX A

STIPULATION OF FACTS

Filed May 3, 1989

1. Plaintiffs are owners of residential property located on Manhattan Drive overlooking and contiguous to the Burlington Municipal Disposal Grounds ("Landfill").

2. Defendant, City of Burlington, Vermont ("City"), has owned and operated the Landfill since at least 1961.

3. The Landfill is located on approximately eleven acres of land to the north of the commercial-residential center of the City.

4. The Landfill is rectangular in shape and is bordered to the north by a portion of the railroad embankment of the Central Vermont Railway, and to the east and south by the properties located along Manhattan Drive.

5. The Landfill is contiguous to the plaintiffs' and their neighbors' properties, along which runs a steep embankment.

6. The Landfill slopes down another fifty feet or so into what is commonly known as the Intervale.

7. The Landfill is adjacent to the Intervale.

8. Future development in the Intervale is zoned in part for recreation, conservation and open space.

9. The Intervale is the flood plain of the Winooski River.

10. The Winooski River is located approximately 3,000 feet east of the Landfill site and Lake Champlain is located approximately 2,600 feet to the southeast.

11. The Intervale has, on occasion, been flooded leaving the entire area covered with surface water, including parts of the Landfill itself.

12. The area adjacent to and north of the Landfill is a wetland, to wit: it is inundated or saturated by surface water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, i.e., a cattail marsh.

13. Before the Landfill commenced operating, the location of the Landfill was a wetland itself. The Landfill is a highly saturated area.

14. The cattail marsh and Intervale are highly saturated areas.

15. The Landfill is underlain primarily by silts and by silty fine sands.

16. The Intervale just north of the Landfill consists mostly of peat underlain by silty fine sands.

17. Groundwater flows generally from south to north and northwest through and beneath the Landfill.

18. Trash is buried in the Landfill at a depth of approximately nine feet above the groundwater table on the southern edge of the Landfill, and at a depth of

approximately nine feet below the groundwater table on the northern edge of the Landfill.

19. Groundwater mixes with and flows through contaminants in the Landfill.

20. Leachate is liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes.

21. Leachate migrating downward through the trash joins through-flowing groundwater in a northerly direction into the Intervale where flow is generally upward.

22. As early as April, 1972, the City was aware that the landfill generated leachate.

23. In or about July, 1984, the generation of leachate by percolation of precipitation into the Landfill mass is estimated to be an average of four million (4,000,000) gallons per year, or an average of 11,000 gallons per day ("GPD").

24. In or about July, 1984, on the average, maximum percolation is estimated to be 32,000 GPD, and could rise to as much as 50,000 GPD during a severely wet month.

25. In or about July, 1984, the generation of leachate by groundwater (which flows through the refuse in the Landfill) is estimated to be approximately 1,000 GPD, and could be two to four times higher.

26. The leachate generated by through-flowing groundwater and percolation through the trash flows northward through and/or beneath the railroad embankment.

27. Most of any leachate which migrates beyond the Landfill boundary reaches the surface of the Intervale within 200 to 300 feet north of the railroad embankment.

28. In June, 1984, as part of a contract with the City, the engineering firm of O'Brien and Gere installed tests wells in and around the Landfill.

29. All of the test wells north of the railroad embankment contain contaminants.

30. Leachate from the Landfill contains chemicals and compounds found on toxic and hazardous lists under RCRA and the CWA.

31. Results of analyses of samples surface water around the Landfill indicate the presence of, among other chemicals, 1, 1 dichloroethane, 1, 2 dichloroeathane, carbon tetrachloride, benzene, xylene, halogenated organic compounds, tetrahydrofuran, nickel, cyanide, phenols, and 1, 1, 1 trichloroethane.

32. Results of analyses of sampled groundwater from monitoring wells around the Landfill indicate the presence of, among other chemicals, halogenated compounds, lead, tetrahydrofuran, nickel, cyanide, bis (2-ethylhexyl) phthalate, phenols, 1, 2 dichloroethane, pentachlorophenal, endosulfan sulfate, and nitrates.

33. 40 C.F.R. § 401.15 lists the "toxic pollutants" designated by the Administrator of the United States Environmental Protection Agency pursuant to 33 U.S.C. § 1317(a). The Administrator has designated those pollutants whose nature and extent of toxic effect warrant inclusion on the list and consequent limitation of release to the environment. Water test results from sampling in

and around the Landfill show the presence of the following toxic pollutants listed under 40 C.F.R. § 401.15: carbon tetrachloride, benzene, lead, toluene, cyanide, phenol, pentachlorophenol, endosulfan sulfate, 1, 1 dichloroethane, 1, 2 dichloroethane, and 1, 1, 1 trichloroethane.

34. Groundwater in the acquifer beneath and around the Landfill contains less than 10,000 mg/1 total dissolved solids.

35. Well 84-2A is located near the northern edge of the Landfill.

36. Leachate from the Landfill was evaluated for toxicity to freshwater aquatic life, using standard bioassay techniques.

37. Leachate from the Landfill is toxic to the fathead minnow, Daphnia (water flea) and algae.

38. The majority of any leachate which escapes the leachate collection system enters directly directly into the shallow groundwater.

39. A culvert is "a transverse drain or waterway (as under a road, railroad, or canal)." (*Webster's Third New International Dictionary*, 553 (3d ed. 1981).

40. The city installed a leachate collection system, which is designed to prevent up to 90 percent of the leachate from leaving the Landfill.

41. The leachate collection system was designed and installed for the purpose of mitigating leachate migration problems at the Landfill.

42. Since the pump station associated with the City's leachate collection system started operating until

October 3, 1986, the amount of leachate from the Landfill pumped to the City's main sewage treatment plant was estimated to be approximately 6,161,000 gallons. This estimation was based on the hours of operation for each pump, the average pumping rate, and an estimation that the pumps pumped simultaneously for 50% of the time.

43. Leachate from the Landfill collected in a perimeter ditch from mid-December 1985 until the pump station associated with the City's leachate collection system became operable. Any leachate that was collected in this ditch was pumped back into the Landfill.

44. Between 1950 and 1979, the General Electric Company disposed of approximately 200,000 gallons of liquid containing the following hazardous wastes in drums into the Landfill:

a. trichloroethylene, a spent halogenated solvent used in degreasing;

b. paint solvents and lubricating oils;

c. plating or paint sludge solids containing cadmium;

d. acid plating solids containing chromium;

e. paint sludge solids containing lead;

f. electroplating sludge solids containing sulfuric acid;

g. plating sludge solids containing chromium.

45. Between 1976 and December, 1980, the E.B. & A.C. Whiting Company disposed of approximately 20 pounds per month of degreasing solvent-soaked rags and approximately 300 pounds per month of heat-treating salt

containing lead, barium, cadmium, chromium, arsenic, and mercury into the Landfill.

46. As of January, 1978, the G.S. Blodgett Company, Inc. disposed of approximately 10 gallons per week of kerosene, 5 gallons per week of lacquer thinner, 25 gallons per week of washing solvent containing trichloroethylene, and 15 gallons per week of toluene into the Landfill.

47. In 1978, the Edlund Company terminated its practice of disposing of approximately 264 pounds per year of sodium cyanide into the Landfill.

48. In June, 1982, the Hagar Hardware & Paint Company notified the Vermont Agency of Environmental Conservation that it disposed of approximately 85 gallons per year of a degreaser containing petroleum distillates (kerosene), 0-dichlorobenzene, (chlorinated) phenols, and potassium hydroxide, 350 gallons per year of a cleaning power containing sodium hydroxide and phenol, and 36 gallons per year of grease and oil sludge into the Landfill.

49. Up until May 12, 1982, Hagar Hardware & Paint Company's practice was to take the grease and oil sludge generated at its machine shop to the Landfill in five-gallon buckets.

50. At the Landfill, an employee of Hagar Hardware & Paint Company would pour the grease and oil sludge out of the bucket (or pail) and into the Landfill, and then return to the Company with the bucket.

51. By letter dated July 27, 1982, the State of Vermont Agency of Environmental Conservation informed the Hagar Hardware & Paint Company that it did not

qualify for small quantity generator exemption but, rather, was classified as a large quantity generator of hazardous waste.

52. Copies of the July 27, 1982 letter were sent to Steven Goodkind and James Ogden.

53. No employee of the City ever contacted Hagar Hardware & Paint Company with respect to the disposal of its grease and oil sludge in the Landfill.

54. In July, 1984, the City's Water Resources Department placed between 8 and 11 135-pound drums of anhydrous ferric chloride at the Landfill.

55. In July, 1984, a bulldozer at the Landfill crushed approximately 3 drums containing anhydrous ferric chloride.

56. In August, 1975, the City was put on notice by the Vermont Agency of Environmental Conservation that the General Electric Company and I.H. Weisner, Inc. were potential hazardous waste producers in the Burlington area.

57. In September, 1975, the City in turn notified the General Electric Company and I.H. Weisner, Inc. that they had been listed by the Vermont Agency of Environmental Conservation as potential disposers of hazardous waste.

58. The City made no investigation as to whether those companies had disposed of hazardous waste into its Landfill.

59. Since at least January, 1978, the City knew or should have known that hazardous wastes had been disposed of into the Landfill.

60. In September, 1978, the City was notified by the Vermont Agency of Environmental Conservation that new regulations relating to solid waste management had been developed and adopted, including special requirements for sanitary landfills.

61. The notification also informed the City that hazardous wastes may not be disposed of at sanitary landfills without a special certification for those waste materials.

62. Small quantity generated hazardous wastes were disposed of in the Landfill after November 19, 1980.

63. In December, 1979, the City applied to the State of Vermont for a permit, license, or registration to operate a solid waste facility or sanitary landfill.

64. In March, 1980, the State of Vermont denied the City's application for the operation of a sanitary landfill because of "the potential for greater impact of the landfill on ground and surface waters of the Burlington Intervale and the lack of substantial evidence that this impact would not be adverse."

65. In June, 1980, the Vermont Agency of Environmental Conservation informed the City that the major reason for rejecting its application for certification was the discharge of leachate of significant concentration and indeterminant quantity into the waters of the state.

66. In connection with the denial of certification of the Landfill as a sanitary landfill, the Secretary of the Vermont Agency of Environmental Conservation informed the City by letter dated June 23, 1980: "The water samples taken both by your engineers and by ourselves indicate that leachate which is being discharged

through the culvert into the marsh and under the railroad grade is as concentrated as any we have seen in Vermont."

67. In that letter, the Secretary of the Vermont Agency of Environmental Conservation also informed the city: "We have looked only at several diagnostic parameters, but these few show clearly that very contaminated water is being discharged into the wetland directly downgradient from the landfill."

68. On January 28, 1982, the State of Vermont issued a Solid Waste Disposal Facility Certification to the City.

69. The Certification contemplated the construction and operation of a resource recovery facility.

70. The Certification was effective from January 30, 1982 through January 30, 1987.

71. The Landfill has not received a National Pollutant Discharge Elimination System permit or a permit from the State of Vermont to discharge toxic and hazardous pollutants into the wetland.

72. The Notification of Hazardous Waste Site form (submitted by the City to the EPA) is used by the EPA to locate hazardous waste sites which treated, stored, or disposed of hazardous waste in the past and at which hazardous waste is still present.

73. The City has not applied to the EPA for a permit to dispose of hazardous wastes in the Landfill.

74. The City has not received from either the EPA or the State of Vermont a permit to dispose of hazardous wastes.

75. The Landfill does not have interim status to dispose of hazardous wastes.

76. For land disposal facilities which had been granted interim status prior to November 8, 1984, interim status terminated on November 8, 1985.

77. Methane is a colorless, flammable gaseous hydrocarbon and a by-product of organic decomposition.

78. The Landfill generates methane gas.

79. Methane gas generally rises but may move in a horizontal direction when the surface of the ground is frozen.

80. In late 1984, the City installed approximately forty (40) methane gas monitoring wells at and beyond the Landfill.

81. The gas monitoring readings, taken prior to December 27, 1985, established that the flow of methane gas moved from the Landfill boundary toward Manhattan Drive.

82. Concentrations of explosive gas (methane) generated by the Landfill have exceeded the "lower explosive limit" (the lowest percent by volume of a mixture of explosive gases which will propagate a flame in air at 25°C and atmospheric pressure) for the gas at the Landfill boundary.

83. Tests taken from gas monitoring wells ("GMW") located beyond the Landfill boundary on other properties along Manhattan Drive but not on the Dague's property indicated the following:

a. GMW#1 – between May 7, 1985 and November 29, 1985 concentrations of methane found within GMW#1 exceeded the lower explosive limit on 14 occasions;

b. GMW#3 – between February 22, 1985 and November 29, 1985 concentrations of methane found within GMW#3 exceeded the lower explosive limit on 26 occasions;

c. GMW#4 – between November 8, 1985 and November 14, 1985 concentrations of methane found within GMW#4 exceeded the lower explosive limit on 2 occasions;

d. GMW#25 – between March 21, 1985 and April 25, 1985 concentrations of methane found within GMW#25 exceeded the lower explosive limit on 5 occasions;

e. GMW#26 – between March 28, 1985 and May 30, 1985 concentrations of methane found within GMW#26 exceeded the lower explosive limit on 4 occasions;

f. GMW#27 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#27 exceeded the lower explosive limit on 11 occasions;

g. GMW#28 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#28 exceeded the lower explosive limit on 11 occasions;

h. GMW#29 – between March 21, 1985 and May 9, 1985 concentrations of methane found within GMW#29 exceeded the lower explosive limit on 8 occasions;

i. GMW#30 – between March 21, 1985 and May 17, 1985 concentrations of methane

found within GMW#30 exceeded the lower explosive limit on 9 occasions;

j. GMW#31 – between March 28, 1985 and June 13, 1985 concentrations of methane found within GMW#31 exceeded the lower explosive limit on 12 occasions;

k. GMW#32 – between March 21, 1985 and May 17, 1985 concentrations of methane found within GMW#32 exceeded the lower explosive limit on 14 occasions;

l. GMW#33 – between March 21, 1985 and May 30, 1985 concentrations of methane found within GMW#33 exceeded the lower explosive limit on 11 occasions;

m. GMW#34 – between March 21, 1985 and June 13, 1985 concentrations of methane found within GMW#34 exceeded the lower explosive limit on 13 occasions;

n. GMW#35 – between March 21, 1985 and March 28, 1985 concentrations of methane found within GMW#35 exceeded the lower explosive limit on 2 occasions;

o. GMW#37 – between March 21, 1985 and March 28, 1985 concentrations of methane found with GMW#37 exceeded the lower explosive limit on 2 occasions;

p. GMW#38 – on March 28, 1985 concentrations of methane found within GWM#38 exceeded the lower explosive limit;

84. Gas monitoring wells #'s 1, 35, 37 and 38 are all located near the top of the embankment at the Landfill boundary.

85. Methane gas has seeped into the basement of Betty Dague's residence.

86. Gas well readings taken by the City from gas wells located on the Dague's property at 272 Manhattan Drive between November, 1984 and August, 1985 show at least 829 separate readings above the lower explosive limit of methane gas (4 percent gas to air or greater).

87. The City installed methane monitoring equipment in Betty Dague's residence, including a noise alarm which is set to go off when gas levels reach twenty percent of the lower explosive level.

88. Over twenty monitoring wells have also been installed throughout the Dague's yard.

89. During 1985 several of the wells contained methane gas in explosive-level concentrations.

90. In the spring, 1985, the City dug a hole (approximately 40' X 40' X 30') in the Dague's back yard in search of a methane gas channel.

91. On December 27, 1985, during the construction of the City's gas ventilating system, the City installed temporary blowers on individual wells drilled in connection with the system which were operated until the system became fully operational.

92. Thereafter, from January 4 to January 10, 1986, some of the test wells, which previously showed positive gas readings, showed no gas.

93. The City has installed a gas ventilating system which is designed to prevent the migration of methane gas away from the Landfill.

94. The gas ventilating system was designed and installed for the purpose of preventing continuing methane gas migration at the Landfill.

95. The gas ventilating system is a series of 16 perforated wells along the eastern and northern rim of the Landfill connected to a continuously operating vacuum pump. The Landfill gases, including methane, are continually collected and burned for destruction.

96. Since the installation of the gas ventilating system, the test wells on the Dague's property and other properties located along Manhattan Drive, which previously had concentrations of gas in excess of the lower explosive limit, no longer do so.

97. From March, 1980, to January, 1982, the State of Vermont permitted the City to operate the Landfill without certification.

98. During 1980 and 1981, the City developed a plan for a trash-burning plant (a Resource Recovery Facility or "RRF").

99. The December 15, 1981 Assurance of Discontinuance required the City to cease the disposal of all refuse, with the exception of the residue from a planned resource recovery facility, at the Landfill as of July 1, 1984.

100. The agreement specifically allowed the City to petition the State for an extension of the July 1, 1984 closure date if the City were unable to construct the planned resource recovery facility.

101. The agreement also obligated the City to submit engineering plans providing for methane gas control and for ground and surface water monitoring.

102. In May, 1983, the Mayor of the City vetoed an aldermanic resolution authorizing the construction of the resource recovery facility.

103. The Mayor's veto was sustained in December, 1983.

104. After deciding not to proceed with the construction of a resource recovery facility, the City requested and was granted a "limited extended operational period" for the Landfill – an extension of the July 1, 1984 closure date of the Landfill.

105. This extension was granted by way of an amendment, executed on September 12, 1984, to the December 15, 1981 Assurance of Discontinuance.

106. The September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance required the City to upgrade the Landfill to meet certification standards in accordance with engineering plans approved by the Vermont Agency of Environmental Conservation or discontinue the disposal of solid waste by January 2, 1985. Admit, ¶ 90.)

107. The September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance also required the City to implement several operational controls immediately in order to minimize the adverse impact of the Landfill's operations.

108. The terms and conditions of the September 12, 1984 amendment superseded and pre-empted all the

requirements of the December 15, 1981 Assurance of Discontinuance and the requirements of the Solid Waste Disposal Facility Certification issued to the City on January 28, 1982.

109. The City was again granted another extension by way of an amendment, executed on January 31, 1985, to the December 15, 1981 Assurance of Discontinuance and to the amendment executed on September 12, 1984.

110. The January 31, 1985 amendment granted the City a three-year extension of the July 1, 1984 closure date for the Landfill.

111. The terms and conditions of the January 31, 1985 amendment supersede and pre-empt: all requirements of the December 15, 1981 Assurance of Discontinuance; all requirements of the September 12, 1984 amendment to the December 15, 1981 Assurance of Discontinuance and the requirements of the Solid Waste Disposal Facility Certification issued to the City on January 28, 1982 and is in lieu of conditional certification.

112. At various times, the City has violated conditions of the December 15, 1981 Assurance of Discontinuance and the two succeeding amendments thereto.

113. Since July, 1972 the City has on occasions failed to provide adequate daily cover and compaction at the Landfill.

114. Further, a leachate collection system and methane control system were not in operation by September 1, 1985 and December 2, 1985, respectively, as required by the January 31, 1985 amendment.

115. The December 15, 1981 Assurance of Discontinuance, and subsequent amendments to it, were signed by a judge of the Vermont Superior Court, and under state law constituted an order issued by a court, the violation of which could result in the imposition of civil penalties.

116. Condition (2) of the January 31, 1985 amendment page 8, provides in part:

> On or before January 1, 1987, the City shall submit a written notification to the Secretary [of the Vermont Agency of Environmental Conservation] which describes what long term disposal options the City intends to pursue. Depending upon the substance of this notification, the City shall take the following action:
>
> (a) If the City plans to utilize a certified sanitary landfill, then the Facility [the Landfill] shall be completely closed in accordance with the Regulations on or before January 1, 1988 . . . ;
>
> or
>
> (b) If the City plans to utilize a resource recovery facility, but not necessarily limited to incineration, then by January 1, 1988, the City shall make a commitment which is persuasive to the Agency to guarantee that this goal is attainable. By making this commitment, the City pledges to negotiate a guaranteed start up of operation for a resource recovery facility on or before January 1, 1990. By choosing this alternative, the City commits to closing out the remaining portion of the Landfill by January 1, 1990.

117. The City did not choose to utilize a resource recovery facility pursuant to condition (2)(b) of the January 31, 1985 amendment.

118. On September 1, 1987, the City and Vermont Agency of Natural Resources (formerly known as the Vermont Agency of Environmental Conservation) entered into another amendment to the January 31, 1985 Assurance of Discontinuance.

119. The Findings of Fact of the September 1, 1987 amendment provide in part:

> 1. The City of Burlington has entered an agreement with H.A. Manosh, Incorporated for the purpose of assuming future solid waste disposal capacity at the Manosh landfill, a certified solid waste disposal facility, for the residents of Burlington. H.A. Manosh, Incorporated has entered a contractual agreement with the town of Stowe to dispose of wastes accepted at the Stowe municipal transfer station. . . .
>
> 3. Condition 13 of the Assurance of Discontinuance [dated January 31, 1985] between the city of Burlington and the Agency of Environmental Conservation (renamed Agency of Natural Resources by act of 1987 Vermont Legislature) limits disposal at the Burlington landfill to wastes generated within the limits of Burlington.

120. The Conditions, Requirements and Restrictions of the September 1, 1987 amendment provide:

> 1. The city of Burlington shall operate the Burlington landfill in accordance with the conditions of the Assurance of Discontinuance

dated January 31, 1985 except as amended below.

2. Condition 13 of the Assurance of Discontinuance is revised to read:

The disposal of solid waste at the Facility [the Landfill] shall be limited to wastes generated within the limits of the city of Burlington and the town of Stowe.

121. The September 1, 1987 amendment to the January 31, 1985 Assurance of Discontinuance was entered upon the Court records as an order of the Chittenden Superior Court pursuant to 3 V.S.A. Section 2822 by Judge Mathew I. Katz on September 28, 1987.

122. The disposal of solid waste at the Landfill now includes wastes generated not only within the limits of the City of Burlington but also within the limits of the town of Stowe.

123. The Landfill was not completely closed on or before January 1, 1988 and is still accepting solid waste for disposal.

124. The City plans to convert the Landfill into a public park after close-out finally occurs.

125. The City was notified by a State of Vermont Inspector in April, 1977 about the need to control windblown papers from the Landfill.

126. The Vermont Agency of Environmental Conservation notified the City by letter dated May 26, 1978 that it had "recently received a number of formal complaints about the operation [of the Landfill] in regard to daily cover and the odor of the Landfill."

127. In August, 1978, a State of Vermont inspector found inadequate cover of garbage at the Landfill.

128. In September, 1978, a State of Vermont inspector found inadequate cover of garbage at the Landfill.

129. In October and December, 1978, the City received letters directed to the Mayor of the City from the University of Vermont Department of Geology indicating an explosive gas problem at the Landfill.

130. The City received inspection reports from the Vermont Agency of Environmental Conservation in October and November, 1979 which indicated unsatisfactory amounts of daily cover being used at the Landfill.

131. In January, 1981, the City was granted permission by the Vermont Agency of Environmental Conservation to landfill approximately 300 cubic yards of sewage sludge at the Landfill.

132. In March, April, June and August, 1981, Vermont Agency of Environmental Conservation inspectors claimed to have found repeated violations of lack of daily cover at the Landfill, and notified the City of such violations. The City received an "Application Review Report" from the Vermont Agency of Environmental Conservation dated December, 1981 in which problems with inadequate cover, rodents and methane gas migration were noted in the history of the Landfill.

133. In March, 1982, the City received an inspection report from the Vermont Agency of Environmental Conservation indicating unsatisfactory amounts of daily cover being used at the Landfill.

134. In April, 1982, the City informed the Vermont Agency of Environmental Conservation that it had entered into a new contract for cover material at the Landfill, and that previous problems relating to daily cover of garbage were due to the prior supplier's inability to provide cover material.

135. In May, 1982, a Vermont Agency of Environmental Conservation inspector claimed to have found several days of garbage left uncovered and spoke to the operator of the Landfill about the problem.

136. In July, 1982, the City received a complaint from Ernest Dague, Sr. that windblown dust and ashes from the Landfill were coming into his back yard, pool and screenhouse.

137. The Vermont Agency of Environmental Conservation investigated Ernest Dague's complaint regarding dust and ashes from the Landfill in July, 1982, and spoke with Mr. John Rasys, building inspector for the City about the problem.

138. On August 4, 1982, the Vermont Agency of Environmental Conservation contacted City Streets Department Superintendent James Ogden to discuss dust control at the Landfill.

139. In February, 1983, a Vermont Agency of Environmental Conservation inspector claimed to have found deficiencies in compaction and covering of garbage at the Landfill, and discussed these problems with Mr. Ogden.

140. Following the meeting in February, 1983 with the Vermont Agency of Environmental Conservation inspector, Mr. Ogden informed the inspector that he

would take immediate action with regard to cover at the Landfill.

141. In March, 1983, a Vermont Agency of Environmental Conservation inspector claimed to have found inadequate compaction and cover of garbage at the Landfill.

142. On May 9, 1983, the City Board of Aldermen voted to send a letter to the City Street Commission expressing their displeasure with the continual unsatisfactory Landfill inspection reports from the Vermont Agency of Environmental Conservation and requesting action to correct the problems.

143. On June 21, 1983, Ernest Dague telephoned a complaint to the City that the Landfill was very dusty. The complaint form number 2016 indicates that the road was watered as a result of the complaint.

144. In July, 1984, the Vermont Agency of Environmental Conservation granted the City an extension to operate the Landfill on the condition that operational procedures be corrected.

145. In April, May, June, July and August, 1984, a Vermont Agency of Environmental Conservation inspector claimed to have found inadequate compaction and daily cover of garbage at the Landfill and informed the Landfill operator of the violation.

146. The subject of rodents, cover and compaction of cover garbage were also discussed at the August 15, 1984 meeting among Vermont Agency of Environmental Conservation and City officials.

147. On November 28, 1984, the City measured methane gas concentrations above the lower explosive limit around the houses at 256-258 Manhattan Drive.

148. As a result of the gas readings taken on November 28, 1984, additional gas wells were installed around the perimeter of the Landfill and the City began testing for methane regularly at the test wells sites.

149. On December 11, 1984, the City sent Ernest Dague, Jr. a letter regarding the levels of methane gas detected in and around his home at 272 Manhattan Drive.

150. In December, 1984, Vermont Agency of Environmental Conservation representatives met with Mr. Ogden to investigate methane gas generation at the Landfill and to inspect and supervise remedial actions taken by the City to vent methane gas away from Manhattan Drive properties.

151. The City regularly tested for methane gas along Manhattan Drive in December, 1984 and continued doing so until at least February, 1986.

152. On January 15, 1985, Messrs. Goodkind and Ogden, among others, met to discuss methane migration at the Landfill and sippage of the embankment above the Landfill.

153. In February, 1985, the City Solid Waste Task Force requested that the City Board of Aldermen place a $2.4 million bond issue for capital improvements at the Landfill on the March, 1985 ballot.

154. The $2.4 million bond issue was placed on the March, 1985 ballot, and was defeated by City voters.

155. On February 21, 1985, the City Board of Aldermen voted to lend a gas detection device to Ernest Dague, Jr. so that he could take readings for the presence of methane gas in his home.

156. On February 21,1985 the City Board of Aldermen voted to refer to the City Board of Finance a proposal to pay $500.00 per month to Ernest Dague, Jr. and to Paul Robar as compensation for methane gas problems caused by the Landfill.

157. A site inspection at the Landfill on or about February 27, 1985, revealed that coal ash was being improperly disposed of at the Landfill. In particular, coal ash was being stock-piled along with other cover material, was being used to construct an access road in the Landfill, and was not being covered properly.

158. On March 18, 1985, the City Board of Finance voted unanimously to purchase a gas detection device for the use of Ernest Dague, Jr.

159. On April 3, 1985, Mr. Goodkind notified the Superintendent of the City Parks and Recreation Department that garbage dumped by the Parks Department during the weekend would often be left uncovered at the Landfill until Monday mornings.

160. In April, 1985, the City investigated an abandoned sewer overflow line to ascertain if it had been acting as a passageway for methane being generated in the Landfill.

161. In April, 1985, Mr. Ogden informed Ernest Dague, Jr. that a hole would need to be dug in his yard to

locate a sewer overflow pipe which may have been acting as a conduit for Landfill gas.

162. The City agreed to indemnify the Dagues for damage which might be caused by the City's excavation and to restore their yard to its pre-excavation condition.

163. By letter dated April 23, 1985, the Vermont Agency of Environmental Conservation asserted that the City that methane gas generation from the Landfill was creating a nuisance and a risk of fire and explosion in and around the Landfill.

164. On April 23, 1984, the City was notified by a Vermont Agency of Environmental Conservation inspector that further cover material and compaction of garbage were needed at the Landfill.

165. In July, 1985, the City received a complaint from Donald Bessette that trees, shrubs and grass were dying on his mothers property at 310 Manhattan Drive.

166. In July, 1985, Paul Mattor, an employee of the City Health & Safety Department, investigated the complaint and found that methane gas migrating from the Landfill was entering the Bessette property at 310 Manhattan Drive and causing plant defoliation and death. Mr. Mattor also advised Mr. Bessette that he should postpone his plans to build on the embankment until the City had completed installation of its gas control system.

167. The City contracted with Abalene Pest Control which applied poisons for rodent control at the Landfill on April 19, August 2, and August 16, 1986.

Burlington, Vermont. 2 May 1989.

DOWNS RACHLIN & MARTIN
By: /s/ Richard N. Bland
Richard N. Bland
Attorneys for Plaintiffs
199 Main Street
P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT

District of Vermont

Betty Dague, Administratrix of the estate of Ernest Dague, Sr., et al

v.

City of Burlington

JUDGMENT IN A CIVIL CASE

CASE NUMBER 85-269

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the city of Burlington, Vermont, close the Landfill on or before January 1, 1990. Civil penalties shall not be imposed pursuant to 42 U.S.C. § 6928(g) or 33 U.S.C. § 1319(d). The plaintiffs shall recover from the defendant the sum of $198,027.50 for attorney fees, plus necessary expenses in the amount of $10,929.66 together with a 25% enhancement of the total attorney's fees in the amount of $49,506.87 plus taxable costs. Judgment is entered for the defendant as to County I; the defendant, in part, and the plaintiffs, in part, as to Count II; and the plaintiffs as to Counts III and IV.

May 7, 1990
Date

LEONARD W. LAFAYETTE
Clerk

/s/ C. Burbank
(By) Deputy Clerk

91-810 (2)

No. _____

Supreme Court, U.S.
FILED
NOV 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 118-279

ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
Burlington, Vermont
Of Counsel

MICHAEL B. CLAPP
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, VT 05402-0998
(802) 864-5751

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

APPENDIX

TABLE OF CONTENTS

Page

VOLUME I

Opinion of Second Circuit Court of Appeals, June 12, 1991 ..... App. 1

Order of Second Circuit Court of Appeals, October 25, 1991 ..... App. 38

Opinion of United States District Court for the District of Vermont, March 26, 1986..... App. 40

Order of United States District Court for the District of Vermont, February 5, 1987 ..... App. 54

Opinion of United States District Court for the District of Vermont, October 16, 1989 ..... App. 59

Judgment of United States District Court for the District of Vermont, May 7, 1990 ..... App. 116

VOLUME II

Opinion of United States District Court for the District of Vermont, March 15, 1990..... App. 118

Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990 ..... App. 130

Order of United States District Court for the District of Vermont, May 4, 1990..... App. 135

Order of United States District Court for the District of Vermont, October 11, 1991 ..... App. 137

Docket Entries, United States District Court for the District of Vermont, first page only .... App. 139

TABLE OF CONTENTS – Continued

Page

Opinion and Order of Second Circuit Court of Appeals, August 20, 1986 ..... App. 142

Order of Second Circuit Court of Appeals, August 20, 1991, denying Motion for Rehearing .... App. 145

United States Constitution, Article I, Section 1 .. App. 147

United States Constitution, Article III, Section 1 ..... App. 147

United States Constitution, Article III, Section 2 ..... App. 147

33 U.S.C. § 1311 ..... App. 149

33 U.S.C. § 1317 ..... App. 150

33 U.S.C. § 1342 ..... App. 157

33 U.S.C. § 1362 ..... App. 178

33 U.S.C. § 1365 ..... App. 183

42 U.S.C. § 6922 ..... App. 188

42 U.S.C. § 6925 ..... App. 191

42 U.S.C. § 6926 ..... App. 209

42 U.S.C. § 6928 ..... App. 215

42 U.S.C. § 6930 ..... App. 228

42 U.S.C. § 6945 ..... App. 224

42 U.S.C. § 6972 ..... App. 232

40 C.F.R. § 254 ..... App. 240

Plaintiffs' complaint ..... App. 244

Affidavit of William W. Pearson dated November 4, 1985 ..... App. 270

TABLE OF CONTENTS – Continued

Page

Letter of October 8, 1985, Attachment A to Affidavit of William W. Pearson ..... App. 273

Letter of November 5, 1985, attached to Affidavit of William W. Pearson ..... App. 275

Affidavit of Steven Goodkind dated December 7, 1989 ..... App. 277

Ernest DAGUE, Sr., Ernest Dague, Jr., and Betty Dague, Plaintiffs

v.

CITY OF BURLINGTON, Defendant.

Civ. No. 85-269.

United States District Court, D. Vermont.

March 15, 1990.

OPINION AND ORDER

BILLINGS, Chief Judge.

On December 11, 1989 defendant moved, pursuant to Fed. R. Civ. P. 12 and 56 for dismissal and/or summary judgment as to Counts II, III and, in part, Count IV. Trial by court on defendant's liability as to these counts was held in May 1989 and with the exception of Count I this court found substantially for the plaintiffs. *See Dague v. City of Burlington*, 732 F. Supp. 458 (D.Vt.1989). Nonetheless, defendant bases this late-hour motion solely on the Supreme Court's recent decision in *Hallstrom v. Tillamook County*, ___U.S. ___, 110 S.Ct. 304, 107 L.Ed. 2d 237 (1989). For the forthcoming reasons, the court concludes that *Hallstrom* does not mandate dismissal of these counts; therefore, the defendant's motion is DENIED.

I. BACKGROUND

On October 8, 1985 plaintiffs sent letters by first-class mail to the Environmental Protection Agency (EPA), the State of Vermont, and the defendant City of Burlington alleging that the defendant was operating its landfill in violation of the Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. §§ 6901-6992k (1983 & Supp. 1989) and the Clean Water Act (CWA), 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 1989). In particular, plaintiffs alleged in the letters that the defendant was violating 42 U.S.C. §§ 6925, 6930, and 6945 of RCRA and 33 U.S.C. §§ 1311, 1317, and 1342 of the CWA. The next day plaintiffs filed suit in this court.[1]

Count I of plaintiffs' complaint accuses the defendant of violating the notice and permit requirements for hazardous waste disposal contained in 42 U.S.C. §§ 6925(a) and 6930(a) and their corresponding regulations. Count II charges defendant with violating the open dumping prohibitions of 42 U.S.C. § 6945 and the regulations promulgated thereunder. Count III claims, pursuant to 42 U.S.C. § 6972(a)(1)(B), that defendant is disposing of solid or hazardous wastes in a manner in which "may present an imminent and substantial endangerment to health or the environment." Count IV contends that defendant is violating 33 U.S.C. §§ 1311, 1317, and 1342 by discharging toxic and other pollutants into a navigable waterway without a permit. Counts V through IX allege various

[1] Defendant does not argue that the letters reached the appropriate parties after the commencement of the civil action. *See* 40 C.F.R. § 254.2(c) (1989) (notice is considered served on date of receipt).

Vermont common law and statutory violations which are not at issue in the motion now before the court.

In May 1989, trial by court was held on defendants liability under Counts I through V; the court subsequently issued its Findings of Fact, Opinion, and Order. *See* 732 F. Supp. 458 (D.Vt.1989). In short, this court found that the plaintiffs had failed to prove the allegations of Count I but had sufficiently established liability under Counts II, III, IV, and V. Indeed, the court concluded that the plaintiffs had substantially prevailed on both the RCRA and the CWA claims and thus the defendants were ordered to pay the costs of litigation pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

Moments prior to the court's hearing on reasonable attorneys' fees, however, the defendant, relying on the recent decision of *Hallstrom v. Tillamook County*, ___U.S. ___, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989), filed this motion requesting the court to dismiss Counts II, III, and in part, IV. In *Hallstrom*, the Court emphatically refused to depart from the literal meaning of the notice requirements of the citizen suit provisions of RCRA. Section 6972(b)(1)(A) prohibits actions brought under that section "prior to sixty days after the plaintiff has given notice of the violation" to the Environmental Protection Agency (EPA), the State in which the alleged violation occurs, and the alleged violator. In light of this clear statutory language and plaintiffs' failure to give any notice, the Court dismissed the complaint despite the fact that the case has gone to trial and the district court had held that the defendant had violated RCRA. *Id.* 110 S.Ct. at 311.

The Court in *Hallstrom* buttressed its holding by noting that where Congress had determined that 60 days prior notice was unimportant, it had created exceptions. 110 S.Ct. at 309. The Court referred to 42 U.S.C. § 6972(b)(1)(A)(iii) which abrogates the 60-day notice provision for civil actions "respecting a violation of subchapter III." Subchapter III contains the RCRA provisions which address the identification, transportation, storage, and disposal of hazardous wastes. Because violations of subchapter III were not involved in *Hallstrom*, however, the Court did not confront the issue now facing this court of whether citizen plaintiffs must still provide 60 days notice as to non-subchapter III claims when they have properly filed a civil action which alleges a subchapter III violation involving the same facility. Nor did the Court in *Hallstrom* address the remaining issue presented here of whether failure to specifically allege and "endangerment," in a letter which purported to notify the defendant of various RCRA violations, is necessarily fatal to an "imminent and substantial endangerment" claim involving subchapter III.

II. DISCUSSION

Defendant contends that Count II must be dismissed because that claim was not brought under subchapter III and thus is not subject to the relaxed notice provisions. In essence, the defendant requests this court to hold that when a citizen suit involves both hazardous waste (subchapter III) and other RCRA claims arising from one facility, only the hazardous waste claims may be brought without providing sixty days notice pursuant to § 6972(b)(1)(A). Under such a holding a citizen must

choose between delaying 60 days before bringing the hazardous waste claim and thus bring all the claims simultaneously or filing the hazardous waste claim immediately after notice is given and then seek leave to amend the complaint to add the remaining claims after 60 days have passed. The court does not believe Congress intended either outcome.

Section 6972(b)(1)(A)(iii) excuses the 60-day notice requirement in "the case of an action under this section respecting a violation of subchapter III." Where both subchapter III and non-subchapter III violations are involved, however, the application of this provision is equivocal. It is not clear whether only the subchapter III claims may be brought without the 60-day notice or whether the non-subchapter III claims can also be brought as long as the civil action involves at least one subchapter III claim. Given this ambiguity it is appropriate to interpret the provision in a manner most compatible with the statute as a whole. *See Commissioner of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 2277-78, 96 L.Ed.2d 97 (1987); *Ziegler Coal Co. v. Kleppe*, 536 F.2d 398, 408-09 (D.C.Cir.1976).

The interpretation most harmonious with the statute is that when a civil action involves or includes a subchapter III claim the 60-day notice provision is inapplicable. This broad reading of an "action . . . respecting a violation of subchapter III" comports with Congress' two justifications for the 60-day notice requirement. First, the 60-day notice provision allows government agencies to take the lead role in enforcing environmental regulations. *Hallstrom*, 110 S.Ct. at 310. Second, the notice provision preserves a non-adversial climate in which the alleged

violator is given an opportunity to comply with the Act. *Id.* Neither of these justifications would be furthered by selectively dismissing those counts of this civil action which do not involve subchapter III.

As to the first concern, Congress has determined that when hazardous wastes are involved the interest of encouraging a lead governmental enforcement role is substantially diminished. *See* 42 U.S.C. §§ 6972(b)(1)(A)(iii) and (b)(2)(A)(iii). It thus follows there is no need to maintain a window of opportunity for the government to take the lead enforcement role as to non-subchapter III claims when a citizen, acting as a private attorney general, has already lawfully assumed the lead role in bringing a subchapter III claim against the same facility. For that matter it appears unlikely that a governmental agency would pursue a non-subchapter III action when it has ignored the more compelling concerns of a potential hazardous waste violation involving the same facility.

Secondly, the filing of a citizen suit involving subchapter III immediately after notice is given effectively eliminates the opportunity for non-adversial compliance with non-subchapter III regulations. It can hardly be maintained that the adversial climate surrounding a civil action involving a subchapter III violation would behave like an isolated storm cloud and linger over only the filed subchapter III claim while allowing the sun to shine brightly on all other contacts between the alleged violator, the citizen, and the government agencies. In short, requiring a citizen who alleges both subchapter III and non-subchapter III violations of RCRA to bring piecemeal litigation will not at all serve the functions of the notice provisions.

In addition, interpreting "respecting a violation of subchapter III" as involving or including a violation of subchapter III comports with the Supreme Court's characterization of § 6972(b)(1)(A) as "abrogating the 60-day requirement when there is a danger that hazardous waste will be discharged." *Hallstrom*, 110 S.Ct. at 309. Moreover, the Court observed in *Hallstrom* that the citizen suit provisions for other environmental statutes authorize the filing of citizen suits "immediately in cases *involving* violations" of certain emission or effluent standards. *Id.* at 311 (emphasis added) (describing notice provisions of Clean Air Amendments of 1970, 42 U.S.C. § 7604(b) and Federal Water Pollution Control Act, 33 U.S.C. §§ 1365(b), 1317(a)). The notice provisions the Court was referring to in these statutes contain the same operative words as the notice provision at issue here, to wit: an "action respecting" a violation; therefore, the Court's characterization is equally applicable in this case. Defendant's motion to dismiss Count II must thus be rejected.

Defendant also argues that the content of the letter failed to provide adequate notice of the alleged violations of Count III.[2] Count III alleges, pursuant to 42 U.S.C.

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[2] The magistrate has previously held that plaintiffs provided proper notice prior to the filing of this civil action as required by § 6972(b)(2)(A)(iii). *See* Magistrates Report and Recommendation at 33, *Dague v. City of Burlington*, No. 85-269 (D. Vt. February 21, 1986), *adopted in toto*, Opinion and Order, (D. Vt. March 26, 1986). At that time the magistrate rejected defendant's argument that plaintiffs' civil action was subject to the 90-day notice provision. The defendant did not argue before the magistrate that the content of the letter failed to comply with the notice requirements of § 6972(b)(2)(A)(iii).

(Continued on following page)

§ 6972(a)(1)(B), that the solid and hazardous waste disposal methods at the Burlington landfill "may present an imminent and substantial endangerment to health or the environment." A citizen suit cannot be brought pursuant to § 6972(a)(1)(B) unless the plaintiff first provides 90 days "notice of the endangerment" to the EPA, the State where the alleged violation occurs, and the alleged violator. § 6972(b)(2)(A). When the action is brought "respecting a violation of subchapter III," however, the 90-day notice provision is inapplicable and the plaintiff need only give prior "notice of the endangerment" to the appropriate parties. § 6972(b)(2)(A)(iii). Defendant concedes that Count III involves a subchapter III violation but argues that plaintiff did not provide specific "notice of the endangerment" as required by § 6972(b)(2)(A).

Indeed, the letter plaintiffs provided to the EPA, the State of Vermont, and the City of Burlington was not a paradigm of thoroughness. The letter fails to expressly allege either a violation of 42 U.S.C. § 6972(a)(1)(B) or that an "endangerment" existed. On the other hand the letter did state that the City of Burlington was operating its landfill in violation of RCRA and the CWA. In addition, plaintiff's letter cited to specific sections of subchapter III; thus, the defendant had notice that plaintiffs' allegations pertained to the disposal of hazardous wastes.

(Continued from previous page)

Thereafter the defendant did not specifically object to the magistrates determination that notice was proper and this court adopted the magistrate's report *in toto*. Four years subsequent to the filing of the complaint defendant now contends for the first time that the content of the letter was insufficient.

Nevertheless, because the letter did not specifically allege an "endangerment" nor cite to § 6972(a)(1)(B) it technically did not comport with the notice requirement of § 6972(b)(2)(A)(iii) which demands "notice of the endangerment." *See also* 40 C.F.R. § 254.3(a) (1989) (notice should be sufficient to permit identification of the specific permit, standard, regulation, condition requirement, or order alleged to be violated). This defect was not cured by the fact that the plaintiffs, after filing the complaint, provided a copy to the defendant, the EPA, and the State of Vermont because the statute's clear language forbids a complaint to be filed until "after" notification of the "endangerment" is given. § 6972(b)(2)(A)(iii).

To the extent that the content of plaintiffs' letter failed to provide adequate notice of the "endangerment," however, *Hallstrom* does not mandate dismissal. The notice provision at issue in *Hallstrom* did not concern the exception to the 60 and 90-day notice provisions for citizen suits which involve a subchapter III claim. Congress created this exception because it determined that the need to respond immediately to RCRA violations involving hazardous wastes outweighed the interests of promoting initial agency action and voluntary, non-adversarial compliance by the alleged violator. *Hallstrom*, 110 S.Ct. at 309-10. Congress thus authorized citizens to bring a civil action involving subchapter III "immediately" after giving notice of the "endangerment." 42 U.S.C. § 6972(b)(2)(A)(iii). Technically plaintiffs may provide this notice only one minute before they file their complaint and indeed in this case plaintiffs sent notice the day before they filed their complaint. Thus, as a

practical matter, notice in a subchapter III case accomplishes little else than notifying the appropriate governmental agencies and the alleged violator that the filing of a complaint by citizens is imminent. *See United States v. Environmental Waste Control, Inc.*, 710 F.Supp. 1172, 1190 (N.D.Ind.1989).

In contrast, in a non-subchapter III case – like that before the *Hallstrom* Court – specific notice is required to give the appropriate governmental agencies an opportunity to act and the alleged violator an opportunity to comply. *Hallstrom* is further distinguished by the fact that it involved the lack of notice altogether, while defendant here attacks the sufficiency of the letter which admittedly was provided. *See Hallstrom*, 110 S.Ct. at 307.

In light of the nominal value of prior notice in citizen suits involving hazardous wastes the court declines to dismiss Count III – four years after the complaint was filed and two months subsequent to the court's determination that defendant is liable – merely because plaintiff failed to specifically allege an "endangerment."[3] To hold otherwise would allow form to reign over substance and would thwart Congress' purpose of providing an exception to the strict notice requirements in instances

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[3] There is also support for denying defendant's motion to dismiss Count III on the grounds that it was not timely raised. *See Environmental Waste Control*, 710 F.Supp. at 1190 (objections to inadequate notice of hazardous waste claims waived if not timely raised). *Hallstrom* does not necessarily preclude a timeliness bar to alleging improper notice of subchapter III claims because it did not concern subchapter III nor did it involve objections to the content of a letter of notice.

involving the heightened danger and immediacy of hazardous wastes. *See Lamke v. Lynn*, 680 S.W.2d 285 (Mo.Ct.App.1984) (The meaning given by courts to a statutory notice requirement depends largely on the context, purpose, and intent of the statute.); 58 Am.Jur.2d Notice § 2 at 572 (1989). In other words, under the circumstances presented here, literal application of the prior "notice of the endangerment" requirement would produce a result " 'demonstrably at odds with the intentions of its drafters.' " *Hallstrom*, 110 S.Ct. at 310 (quoting *United States v. Ron Pair Enterprises, Inc.*, ___U.S. ___, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989)). Accordingly, defendant's motion to dismiss Count III must be rejected.

Defendant also argues that to the extent that Count IV alleges violations which are subject to the Clean Water Act's 60-day notice provision it must also be dismissed. Defendant concedes that Count IV's alleged violations of 33 U.S.C. § 1317 were properly brought without 60 days notice. Because the operative words of the notice provisions for the Clean Water Act are identical to those in RCRA the defendant proffers essentially the same argument for dismissing parts of Count IV as it did for dismissing Count II. *Compare* 33 U.S.C. § 1365(b)(2) ("an action . . . respecting a violation of . . . section [ ] . . . 1317") *with* 42 U.S.C. § 6972(b)(1)(A)(iii) ("an action . . . respecting a violation of subchapter III"). The court, in turn, rejects this argument on the same grounds as the court rejected defendant's argument concerning Count II. Defendant's motion to dismiss is thus DENIED.

Lastly, defendant requests the court, pursuant to Fed. R.Civ.P. 58, to enter a judgment with respect to those claims in which the court found for the defendant in its

Opinion and Order of October 16, 1989. This motion, however, is MOOTED by the court's denial of defendant's motion to dismiss the remaining counts.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., and BETTY DAGUE	:	Civil No. 85-269
v.	:	
CITY OF BURLINGTON	:	

OPINION AND ORDER

Plaintiffs move for an award of attorneys fees, costs, enhancement of fees, and a delay enhancement of fees. As previously found in our prior orders, plaintiff has substantially prevailed in this cause, and is entitled to an award of attorneys fees pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). *See Hanrahan v. Hampton*, 446 U.S. 754 (1980). There is no need to revisit this issue. Upon consideration of the time records, receipts, affidavits, and memoranda, the court finds that the lodestar amount for hourly rates is reasonable, and the court notes that the defendant does not object to these rates. The court also finds that the number of hours expended, as well as the expert and miscellaneous expenses incurred, is reasonable in connection with this complex litigation. The plaintiff is hereby awarded attorneys fees in the amount of $198,027.50, and expenses, including expert fees, in the total amount of $10,929.66.

Plaintiffs, relying on *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987) (plurality) (*Delaware II*) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984), also seek a 100% enhancement of total attorneys fees. Plaintiffs initially

claim that several factors justify an enhancement: the novelty of the issues; the difficulty in prosecuting the case, the skill and experience of attorneys, and the preclusion of employment by the attorneys. The law, however, does not support plaintiffs' use of these factors to bolster its enhancement request. In *Krieger v. Gold Bond Building Products*, 863 F.2d 1091 (2nd Cir. 1988), the court expressly held that, absent rare and exceptional circumstances, enhancement may no longer be justified on the basis of factors such as the novelty of the issues and the complexity of the litigation because these factors are assumed to be reflected in the hourly rate and number of hours charged by the attorneys; thus, they are subsumed in the calculation of the lodestar amount. *Id.* at 1099 (citing *Blum v. Stenson*, 465 U.S. 866, 883-900 (1984)); *see also Cooper v. State of Utah*, 894 F.2d 1169, 1171 (10th Cir. 1990).

Similarly, the court believes the skill and experience of the attorneys is also accounted for in the hourly rate and number of hours contained in the lodestar amount. As to preclusion of employment the court believes this factor is implicitly taken into account in determining whether enhancement is justified on a contingency/risk basis. Plaintiffs have failed to make a showing that rare and exceptional circumstances exist; therefore, the court declines to enhance the lodestar amount based upon the above factors.

Plaintiffs also claim that enhancement is warranted under the contingency/risk factor. The Second Circuit's post-*Delaware II* standard for determining enhancement pursuant to the contingency/risk factor was enunciated in *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987). There the court held that: "the rationale

that should guide the court's discretion is whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts.' " *Id.* at 298 (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). In applying this standard the court denied enhancement because it found that the plaintiffs were subject to only a slight risk of not prevailing on the merits.[1] 834 F.2d at 298.

Under the fee arrangements here, plaintiffs' attorneys would not have been compensated at all unless plaintiffs prevailed. Unlike *Friends of Earth* the risk of not prevailing was substantial under the facts here. This risk was

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[1] The court recognizes that other circuits have held that Justice O'Connor's test for contingency/risk enhancement, outlined in her *Delaware II* concurrence, is controlling. *See, e.g., Alberti v. Klevenhagen*, 1990 Westlaw 19646 (5th Cir. 1990); *Rode v. Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990); *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). In essence, Justice O'Connor's test requires a fee applicant to establish: (1) that the relevant market compensates for contingency; and (2) that without the possibility for an adjustment for contingency or risk the prevailing party would have had substantial difficulty in finding counsel in the local market. 483 U.S. at 733-34. Defendant here claims that plaintiffs have failed to make a finding that the relevant market compensates for risk. Such a finding, however, is presently not required in this circuit. While the court in *Friends of Earth* conceded that Justice O'Connor's test was "similar" to the Second Circuit test, it continued to follow its prior holding in *Coughlin* which focuses on the risk to plaintiff's counsel and whether absent fee enhancement competent counsel might refuse to accept the case. 834 F.2d at 298 (citing *Coughlin*, 801 F.2d at 576). Until this court is directed otherwise, we will continue to apply the test for enhancement as espoused in *Friends of Earth* and *Krieger*.

evidenced in part by the court's denial of plaintiffs' motion for a preliminary injunction. Moreover, because numerous material facts were disputed plaintiffs did not ultimately prevail until after trial. Finally, from the memoranda and affidavits on file, the court finds that absent an opportunity for enhancement, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law. *Compare Wilder v. Bernstein*, 725 F.Supp. 1324, 1338 (S.D.N.Y. 1989) (inadequate showing that absent enhancement competent counsel could not be retained). In light of these findings, the court concludes that a 25% enhancement is appropriate, but anything more would be a windfall to the attorneys. 483 U.S. at 731 n.12 (" 'Attorney's fees award should only be as large as necessary to attract competent counsel.' ") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2nd Cir. 1986).

Plaintiffs also request a delay enhancement but enhancement based on delay in payment is an exception to the rule that historic rates generally prevail. *New York Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1152 (2d Cir. 1983). To the extent that this case was overly protracted, the court believes the 25% enhancement previously granted for contingency/risk adequately compensates plaintiffs' counsel for the delay in receiving payment. Accordingly, the court declines to entertain a separate delay enhancement.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff shall recover from the defendant the sum of $198, 027.50 for attorneys fees, plus necessary expenses in the amount of $10,929.66, together with a

25% enhancement of the total attorneys fees in the amount of $49,506.87 plus taxable costs.

SO ORDERED.

Dated at Rutland in the District of Vermont this 2nd day of April, 1990

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., and BETTY DAGUE	:	
v.	:	Civil No. 85-269
CITY OF BURLINGTON	:	

ORDER

On April 17, 1990, plaintiffs petitioned the court to enforce its previous order of April 2, 1990 which ordered the defendant to pay attorneys fees and necessary expenses. Defendant City of Burlington responded by moving for an entry of judgment of the April 2, 1990 order as well as the court's order of October 16, 1989.

In consideration of this matter, the court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for a delay in entering judgment on these orders. Specifically, the court finds that with the exception of Count V addressed in the October 16, 1989 order, the claims decided by the two orders are independent from the state claims which remain; thus, there is no fair reason to delay certification for appellate review.

The court finds, however, that the October 16, 1989 order did not finally adjudicate damages as to Count V; therefore it is inappropriate to enter judgment as to that count. *See International Controls Corp. v. Vesco*, 535 F.2d 742, 748 (1976) ("[A] judgment cannot be considered final

as long as it leaves open the question of additional damages."); *Hudson v. Chicago Teachers Union Local No. 1*, 708 F. Supp. 961, 962 (N.D. Ill. 1989).

The defendant's motion for an entry of judgment is GRANTED IN PART. The plaintiff's petition for enforcement is DENIED pending appeal. The court directs the clerk of court to enter judgment as to Counts I, II, III and IV of the court's Opinion and Order, dated October 16, 1989, and the Opinion and Order dated April 2, 1990.

SO ORDERED.

Dated at Rutland in the District of Vermont this 4th day of May, 1990.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE	:	
v.	:	Civil No. 85-260
CITY OF BURLINGTON	:	

ORDER

On June 25, 1991, plaintiffs submitted a supplemental application for attorney's fees and expenses incurred since October 31, 1989, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). Plaintiff also requests a 25% enhancement of the attorney's fees award pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). This court once again finds that plaintiff has substantially prevailed in this cause, and is entitled to an award of attorney's fees and expenses.

Upon consideration of the time records, receipts, affidavits, and memoranda, the court finds that the lodestar amount for hourly rates is reasonable, and the court notes that defendant does not object to these rates. The court further finds that the number of hours expended, as well as the miscellaneous expenses incurred, is reasonable. In accordance with our previous findings regarding enhancement of attorney's fees in this case, the court also finds that a 25% enhancement of attorney's fees is appropriate.

It is hereby ORDERED that plaintiff shall recover from defendant supplemental attorney's fees in the amount of $24,113.00, and supplemental expenses in the

amount of $2,707.61, together with a 25% enhancement of the attorney's fees, or $6,028.25.

SO ORDERED.

Dated at Rutland in the District of Vermont this 11 day of October, 1991.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

DATE	NR.	85-269 DAGUE v. CITY OF BURLINGTON PROCEEDINGS 1008 aus
1985		
Oct 9	1	COMPLAINT.
' '	2	REQUEST FOR JURY TRIAL by pltfs.
' '	3	MOTION for Preliminary Injunction by pltfs.
' '	4	MEMORANDUM in Support of P#3.
' '		ISSUED SUMMONS as to Deft 10-10-85.
' '	5	ORDER OF REFERRAL-AWC-This case is referred to Magistrate Niedermeir for the following purposes: To hear and report on any motion authorized by 28 U.S.C. § 636(b)(1)(B) including pltf's motion for preliminary injunction; order dates for the completion of discovery; to determine any pretrial matter authorized by 28 USC § 636(b)(1)(A); to hold settlement and pretrial conference. Cy to attys. jj
' 17	6	SUMMONS RETURNED SERVED (Acceptance of Service by Atty McNeil). rer
' 21	7	NOTICE OF APPEARANCE of McNeil, Murray & Sorrell, Inc. on behalf of deft.
' '	8	MOTION to Continue Preliminary Injunction hearing and MEMO by deft.
' '	9	DISCOVERY CERTIFICATE by deft. jj
' 24	10	MEMORANDUM in Opposition to defts' motion to continue by pltfs (re:P#8

' '	11	MOTION to Add Additional pltf and to file Amended Complaint and MEMO by pltfs.
' '	12	AFFIDAVIT of Michael Case in support of P#3.
' '	13	AFFIDAVIT of Michael Case in support of P#3.
' '	14	AFFIDAVIT of Pltfs in support of P#3 (File #2 started).
' '	15	AFFIDAVIT of Donald Bessette in support of P#3
' '	16	AFFIDAVIT of Clarke Hermance in support of P#3
' '	17	AFFIDAVIT of B.D. Roebuck in support of P#3
' '	18	AFFIDAVIT of Chris Fastie in support of P#3 jj
Oct 28	19	MOTION to Dismiss and MEMO by Deft City. gww
' '	20	AFFIDAVIT of Frank Reed.
' '	21	CERTIFICATES OF SERVICE. gww
' '		In Chambers of Magistrate Niedermeier, William W. Pearson and Richard Bland. Esqs for pltfs., Joseph E. McNeil and Nancy Sheahan, Esqs. for Deft a conference was held.
' '		In Court (Tape) Statements by Counsel re Motion to Amend. ORDERED: Motion to Amend Complaint and add a Party Pltf is granted.
' '		Hearing on Deft's Motion to Dismiss. Statements by Counsel. ORDERED: Pltfs to file proper notice under the Act, Decision Reserved until after filing of the proper Notice.

' '		Hearing on Deft's Motion to Continue. Statements by Counsel ORDERED: Decision Reserved. Pltfs to respond to Deft's discovery requests within 2 weeks, Deft to respond to Pltfs' discovery requests within 2 weeks after service. Deft to answer Complaint within 7 days.
' '		Hearing on Pltfs' Motion for a Preliminary Injunction. James R. Ogden, Christopher L. Fasti, Craig D. Hindle, and Ernest Dague, Sworn by the Clerk and examined for the Pltf by Mr. Pearson, Crossexamined by Mr. McNeil.
' '		ORDERED: Motion to continue hearing by Deft is granted. Hearing is continued until Dec 9.
' '		IN Chambers a conference was held. gww
Nov 5	22	APPEARANCE of McNeil, Murray & Sorrell, Inc., for Deft and ANSWER, rer
' 7	23	NOTICES to take Deposition of General Electric Co., The Blodgett Co., Inc., E.B. & A.C. Whiting Co., The Edlund Co., Inc., and Hagar Hardware Co. ISSUED Deposition Subpoenas to parties in P#23.
' '	24	AFFIDAVIT of William W. Pearson, Esq. (P#23). lf

* * *

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 20th day of August, one thousand nine hundred and eighty-six.

PRESENT:

HONORABLE GEORGE C. PRATT,
HONORABLE ROGER J. MINER,
Circuit Judges,

HONORABLE EDWARD D. RE,
Chief Judge of the United States Court of International Trade, sitting by designation.

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ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE AND ROSE A. BESSETTE,

Plaintiffs-Appellants,

-against- No. 86-7326

CITY OF BURLINGTON,

Defendant-Appellee,

(Filed

-against- Aug. 20, 1986)

GENERAL ELECTRIC COMPANY, INC., BLODGETT COMPANY, INC., EDLUND COMPANY, INC., E.B. & A.C. WHITING COMPANY, AND HAGAR HARDWARE COMPANY,

Third-Party Defendants.

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This appeal from an order of the United States District Court for the District of Vermont, Franklin S. Billings Jr., *Judge*, came on to be heard on the transcript of the record from the United States District Court for the District of Vermont and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the order of the district court is affirmed.

Appellants, owners of land adjoining the City of Burlington's Municipal Disposal Grounds, appeal from an order denying their motion to preliminarily enjoin the City's operation of that landfill. Appellants sued under the citizen-suit provisions of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972, and the Clean Water Act (CWA), 33 U.S.C. § 1365, as well as under various common law theories of liability, alleging that the operation of the landfill had generally harmed the environment.

Although he found sufficient evidence at the preliminary stage of the proceedings to decide that the City had violated RCRA and CWA, Judge Billings reasoned that an injunction against the operation of the landfill should not then issue because little, if anything, beneficial to the environment would be achieved. Rather, he ordered the City to have a gas ventilating and leachate collection system fully operational within sixty days and indicated that any further relief would have to await a full trial on the merits.

The decision whether to grant or refuse a preliminary injunction lies in the sound discretion of the district judge, whose decision will not be disturbed on appeal

absent an abuse of discretion. *See Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 314-15 (2d Cir. 1982). Here, Judge Billings carefully limited the application of his rulings to the proceedings for a preliminary injunction, and we note that the trial on the merits is imminent. For these reasons, we find no abuse of discretion on this record in refusing to grant the injunction requested by appellants and, therefore, the order of the district court is affirmed.

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

/s/ Roger J. Miner
Roger J. Miner, U.S.C.J.

/s/ Edward D. Re
Edward D. Re, U.S.C.I.T.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of August, one thousand nine hundred and ninety-one.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, ROSE A. BESSETTE,
Plaintiffs-Appellees,

V.

CITY OF BURLINGTON,
Defendant-Appellant.

DOCKET NUMBER 90-7544

(Filed Aug. 20, 1991)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant CITY OF BURLINGTON

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

Constitution of the United States, Article I, Section 1.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Constitution of the United States, Article III, Section 1.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Constitution of the United States, Article III, Section 2.

ARTICLE III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; –

between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 301, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1311.

§ 1311. Effluent limitations

(a) Illegality of pollutant discharge except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 307 as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1317.

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the

applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition,

the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be

included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees. States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards; hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such

treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three year from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) New sources of pollutants into publicly owned treatment works

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under

this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

(e) Compliance date extension for innovative pretreatment systems

In the case of any existing facility that proposes to comply with the pretreatment standards of subsection (b) of this section by applying an innovative system that meets the requirements of section 1311(k) of this title, the owner or operator of the publicly owned treatment works receiving the treated effluent from such facility may extend the date for compliance with the applicable pretreatment standard established under this section for a period not to exceed 2 years –

(1) If the Administrator determines that the innovative system has the potential for industrywide application, and

(2) If the Administrator (or the State in consultation with the Administrator, in any case in which the State has a pretreatment program approved by the Administrator) –

(A) determines that the proposed extension will not cause the publicly owned treatment works to be in violation of its permit under section 1342 of this title or of section 1345 of this title or to contribute to such a violation, and

(B) concurs with the proposed extension.

Section 402, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1342.

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which –

(A) apply, and insure compliance with, any applicable requirements of section 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to

so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment

works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if

appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of

subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this

title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy if each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard

imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or

indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve

such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of the department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of

this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to pollutant if –

(A) material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), (g), (h), (i), (k), (n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified

to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under section 1342 of this title) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for

State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title IV, §§ 401, 402, 403, 404(a), (d), 405, 101 Stat. 65, 66, 67, 69.)

Section 502, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. § 1362.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States

under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source. (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D – Manufacturing" and such other classes of significant waste

producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title V, §§ 502(a), 503, 101 Stat. 75; Nov. 18, 1988, Pub.L. 100-688, Title III, § 3202(a), 102 Stat. 4154.)

Section 505, as added October 18, 1972 of the Clean Water Act of 1948, 33 U.S.C. §1365.

§ 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any

statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) Citizen

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the

Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

(As amended Feb. 4, 1987, Pub.L. 100-4, Title III, § 314(c), Title IV, § 406(d)(2), Title V, §§ 504, 505(c), 101 Stat. 49, 73, 75, 76.)

Section 3002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6922.

§ 6922. Standards applicable to generators of hazardous waste

(a) In general

Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such standards, applicable to generators of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. Such standards shall establish requirements respecting –

(1) recordkeeping practices that accurately identify the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment, and the disposition of such wastes;

(2) labeling practices for any containers used for the storage, transport, or disposal of such hazardous waste such as will identify accurately such waste;

(3) use of appropriate containers for such hazardous waste;

(4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes;

(5) use of a manifest system and any other reasonable means necessary to assure that all

such hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, treatment, storage, or disposal facilities (other than facilities on the premises where the waste is generated) for which a permit has been issued as provided in this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S. C.A. § 1411 et seq.]; and

(6) submission of reports to the Administrator (or the State agency in any case in which such agency carries out a permit program pursuant to this subchapter) at least once every two years, setting out –

(A) the quantities and nature of hazardous waste identified or listed under this subchapter that he has generated during the year;

(B) the disposition of all hazardous waste reported under subparagraph (A);

(C) the efforts undertaken during the year to reduce the volume and toxicity of waste generated; and

(D) the changes in volume and toxicity of waste actually achieved during the year in question in comparison with previous years, to the extent such information is available for years prior to November 8, 1984.

(b) Waste minimization

Effective September 1, 1985, the manifest required by subsection (a)(5) of this section shall contain a certification by the generator that –

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

(As amended Pub.L. 98-616, Title II, § 224(a), Nov. 8, 1984, 98 Stat. 3252.)

Section 3005 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6925.

6925. Permits for treatment, storage, or disposal of hazardous waste

(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. No permit shall be required under this section in order to construct a facility if such facility is constructed pursuant to an approval issued by the Administrator under section 2605(e) of Title 15 for the incineration of polycholorinated biphenyls and any person owning or operating such a facility may, at any time after operation or construction of such facility has begun, file an application for a permit pursuant to this section authorizing such facility to incinerate hazardous waste identified or listed under this subchapter.

(b) Requirements of permit application

Each application for a permit under this section shall contain such information as may be required under

regulations promulgated by the Administrator, including information respecting –

(1) estimates with respect to the composition, quantities, and concentrations of any hazardous waste identified or listed under this subchapter, or combinations of any such hazardous waste and any other solid waste, proposed to be disposed of, treated, transported, or stored, and the time, frequency, or rate of which such waste is proposed to be disposed of, treated, transported, or stored; and

(2) the site at which such hazardous waste or the products of treatment of such hazardous waste will be disposed of, treated, transported to, or stored.

(c) Permit issuance

(1) Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the requirements of this section and section 6924 of this title, the Administrator (or the State) shall issue a permit for such facilities. In the event permit applicants propose modification of their facilities, or in the event the Administrator (or the State) determines that modifications are necessary to conform to the requirements under this section and section 6924 of this title, the permit shall specify the time allowed to complete the modifications.

(2)(A)(i) Not later than the date four years after November 8, 1984, in the case of each application under this subsection for a permit for a land disposal facility which was submitted

before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(ii) Not later than the date five years after November 8, 1984, in the case of each application for a permit under this subsection for an incinerator facility which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(B) Not later than the date eight years after November 8, 1984, in the case of each application for a permit under this subsection for any facility (other than a facility referred to in subparagraph (A)) which was submitted before such date, the Administrator shall issue a final permit pursuant to such application or issue a final denial of such application.

(C) The time periods specified in this paragraph shall also apply in the case of any State which is administering an authorized hazardous waste program under section 6926 of this title. Interim status under subsection (e) of this section shall terminate for each facility referred to in subparagraph (A)(ii) or (B) on the expiration of the five-or eight-year period referred to in subparagraph (A) or (B), whichever is applicable, unless the owner or operator of the facility applies for a final determination regarding the issuance of a permit under this subsection within –

(i) two years after November 8, 1984 (in the case of a facility referred to in subparagraph (A)(ii)), or

(ii) four years after November 8, 1984 (in the case of a facility referred to in subparagraph (B)).

(3) Any permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility. Each permit for a land disposal facility shall be reviewed five years after date of issuance or reissuance and shall be modified as necessary to assure that the facility continues to comply with the currently applicable requirements of this section and section 6924 of this title. Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. Review of any application for a permit renewal shall consider improvements in the state of control and measurement technology as well as changes in applicable regulations. Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

(d) Permit revocation

Upon a determination by the Administrator (or by a State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) of noncompliance by a facility having a permit under this chapter with the requirements of this section or section 6924 of this title, the Administrator (or State, in the case of a State having an authorized hazardous waste program under section 6926 of this title) shall revoke such permit.

(e) Interim status

(1) Any person who –

(A) owns or operates a facility required to have a permit under this section which facility –

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirements of section 6930(a) of this title, and

(C) has made an application for a permit under this section shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. This paragraph shall not apply to any facility which has been previously denied a permit under this section or if authority to operate the facility under this section has been previously terminated.

(2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984, unless the owner or operator of such facility –

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(3) In the case of each land disposal facility which is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section and which is granted interim status under this subsection, interim status shall terminate on the date twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility –

(A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(f) Coal mining wastes and reclamation permits

Notwithstanding subsection (a) through (e) of this section, any surface coal mining and reclamation permit covering any coal mining wastes or overburden which has been issued or approved under the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C.A. § 1201

et seq.] shall be deemed to be a permit issued pursuant to this section with respect to the treatment, storage, or disposal of such wastes or overburden. Regulations promulgated by the Administrator under this subchapter shall not be applicable to treatment, storage, or disposal of coal mining wastes and overburden which are covered by such a permit.

(g) Research, development and demonstration permits

(1) The Administrator may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under this subchapter. Any such permit shall include such terms and conditions as will assure protection of human health and the environment. Such permits –

(A) shall provide for the construction of such facilities, as necessary, and for operation of the facility for not longer than one year (unless renewed as provided in paragraph (4)), and

(B) shall provide for the receipt and treatment by the facility of only those types and quantities of hazardous waste which the Administrator deems necessary for purposes of determining the efficacy and performance capabilities of the technology or process and the effects of such technology or process on human health and the environment, and

(C) shall include such requirements as the Administrator deems necessary to protect

human health and the environment (including, but not limited to, requirements regarding monitoring, operation, insurance or bonding, financial responsibility, closure, and remedial action), and such requirements as the Administrator deems necessary regarding testing and providing of information to the Administrator with respect to the operation of the facility.

The Administrator may apply the criteria set forth in this paragraph in establishing the conditions of each permit without separate establishment of regulations implementing such criteria.

(2) For the purpose of expediting review and issuance of permits under this subsection, the Administrator may, consistent with the protection of human health and the environment, modify or waive permit application and permit issuance requirements established in the Administrator's general permit regulations except that there may be no modification or waiver of regulations regarding financial responsibility (including insurance) or of procedures established under section 6974(b)(2) of this title regarding public participation.

(3) The Administrator may order an immediate termination of all operations at the facility at any time he determines that termination is necessary to protect human health and the environment.

(4) Any permit issued under this subsection may be renewed not more than three times. Each such renewal shall be for a period of not more than 1 year.

(h) Waste minimization

Effective September 1, 1985, it shall be a condition of any permit issued under this section for the treatment, storage, or disposal of hazardous waste on the premises where such waste was generated that the permittee certify, no less often than annually, that –

(1) the generator of the hazardous waste has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable; and

(2) the proposed method of treatment, storage, or disposal is that practicable method currently available to the generator which minimizes the present and future threat to human health and the environment.

(i) Interim status facilities receiving wastes after July 26, 1982

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

(j) Interim status surface impoundments

(1) Except as provided in paragraph (2), (3), or (4), each surface impoundment in existence on November 8, 1984, and qualifying for the authorization to operate under subsection (e) of this section shall not receive, store, or treat hazardous waste after the date four years after November 8, 1984, unless such surface impoundment is in compliance with the requirements of section 6924(*o*)(1)(A) of this title which would apply to such impoundment if it were new.

(2) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) has at least one liner, for which there is no evidence that such liner is leaking; (B) is located more than one-quarter mile from an underground source of drinking water; and (C) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section.

(3) Paragraph (1) of this subsection shall not apply to any surface impoundment which (A) contains treated waste water during the secondary or subsequent phases of an aggressive biological treatment facility subject to a permit issued under section 1342 of Title 33 (or which holds such treated waste water after treatment and prior to discharge); (B) is in compliance with generally applicable ground water monitoring requirements for facilities with permits under subsection (c) of this section; and (C)(i) is part of a facility in compliance with section 1311(b)(2) of Title 331, or (ii) in the case of a facility for which no effluent guidelines required under section 1314(b)(2) of Title 33 are in effect and no permit under

section 1342(a)(1) of Title 33 implementing section 1311(b)(2) of Title 33 has been issued, is part of a facility in compliance with a permit under section 1342 of Title 33, which is achieving significant degradation of toxic pollutants and hazardous constituents contained in the untreated waste stream and which has identified those toxic pollutants and hazardous constituents in the untreated waste stream to the appropriate permitting authority.

(4) The Administrator (or the State, in the case of a State with an authorized program), after notice and opportunity for comment, may modify the requirements of paragraph (1) for any surface impoundment if the owner or operator demonstrates that such surface impoundment is located, designed and operated so as to assure that there will be no migration of any hazardous constitutent into ground water or surface water at any future time. The Administrator or the State shall take into account locational criteria established under section 6924(*o*)(7) of this title.

(5) The owner or operator of any surface impoundment potentially subject to paragraph (1) who has reason to believe that on the basis of paragraph (2), (3), or (4) such surface impoundment is not required to comply with the requirements of paragraph (1), shall apply to the Administrator (or the State, in the case of a State with an authorized program) not later than twenty-four months after November 8, 1984, for a determination of the applicability of paragraph (1) (in the case of paragraph (2) or (3)) or for a modification of the requirements of paragraph (1) (in the case of paragraph (4)), with respect to such surface impoundment. Such owner or operator shall

provide, with such application, evidence pertinent to such decision, including:

(A) an application for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility, if not previously submitted;

(B) evidence as to compliance with all applicable ground water monitoring requirements and the information and analysis from such monitoring;

(C) all reasonably ascertainable evidence as to whether such surface impoundment is leaking; and

(D) in the case of applications under paragraph (2) or (3), a certification by a registered professional engineer with academic training and experience in ground water hydrology that –

(i) under paragraph (2), the liner of such surface impoundment is designed, constructed, and operated in accordance with applicable requirements, such surface impoundment is more than one-quarter mile from an underground source of drinking water and there is no evidence such liner is leaking; or

(ii) under paragraph (3), based on analysis of those toxic pollutants and hazardous constituents that are likely to be present in the untreated waste stream, such impoundment satisfies the conditions of paragraph (3).

In the case of any surface impoundment for which the owner or operator fails to apply under this paragraph

within the time provided by this paragraph or paragraph (6), such surface impoundment shall comply with paragraph (1) notwithstanding paragraph (2), (3), or (4). Within twelve months after receipt of such application and evidence and not later than thirty-six months after November 8, 1984, and after notice and opportunity to comment, the Administrator (or, if appropriate, the State) shall advise such owner or operator on the applicability of paragraph (1) to such surface impoundment or as to whether and how the requirements of paragraph (1) shall be modified and applied to such surface impoundment.

(6)(A) In any case in which a surface impoundment becomes subject to paragraph (1) after November 8, 1984, due to the promulgation of additional listings or characteristics for the identification of hazardous waste under section 6921 of this title, the period for compliance in paragraph (1) shall be four years after the date of such promulgation, the period for demonstrations under paragraph (4) and for submission of evidence under paragraph (5) shall be not later than twenty-four months after the date of such promulgation, and the period for the Administrator (or if appropriate, the State) to advise such owners or operators under paragraph (5) shall be not later than thirty-six months after the date of promulgation.

(B) If any case in which a surface impoundment is initially determined to be excluded from the requirements of paragraph (1) but due to a change in condition (including the existence of a leak) no longer satisfies the provisions of paragraph (2), (3), or (4) and therefore becomes subject to paragraph (1), the period for compliance in paragraph (1) shall be two years after the date of

discovery of such change of condition, or in the case of a surface impoundment excluded under paragraph (3) three years after such date of discovery.

(7)(A) The Administrator shall study and report to the Congress on the number, range of size, construction, likelihood of hazardous constituents migrating into ground water, and potential threat to human health and the environment of existing surface impoundments excluded by paragraph (3) from the requirements of paragraph (1). Such report shall address the need, feasibility, and estimated costs of subjecting such existing surface impoundments to the requirements of paragraph (1).

(B) In the case of any existing surface impoundment or class of surface impoundments from which the Administrator (or the State, in the case of a State with an authorized program) determines hazardous constituents are likely to migrate into ground water, the Administrator (or if appropriate, the State) is authorized to impose such requirements as may be necessary to protect human health and the environment, including the requirements of section 6924(*o*) of this title which would apply to such impoundments if they were new.

(C) In the case of any surface impoundment excluded by paragraph (3) from the requirements of paragraph (1) which is subsequently determined to be leaking, the Administrator (or, if appropriate, the State) shall require compliance with paragraph (1), unless the Administrator (or, if appropriate, the State) determines that such compliance is not necessary to protect human health and the environment.

(8) In the case of any surface impoundment in which the liners and leak detection system have been installed pursuant to the requirements of paragraph (1) and in good faith compliance with section 6924(*o*) of this title and the Administrator's regulations and guidance documents governing liners and leak detection systems, no liner or leak detection system which is different from that which was so installed pursuant to paragraph (1) shall be required for such unit by the Administrator when issuing the first permit under this section to such facility. Nothing in this paragraph shall preclude the Administrator from requiring installation of a new liner when the Administrator has reason to believe that any liner installed pursuant to the requirements of this subsection is leaking.

(9) In the case of any surface impoundment which has been excluded by paragraph (2) on the basis of a liner meeting the definition under paragraph (12)(A)(ii), at the closure of such impoundment the Administrator shall require the owner or operator of such impoundment to remove or decontaminate all waste residues, all contaminated liner material, and contaminated soil to the extent practicable. If all contaminated soil is not removed or decontaminated, the owner or operator of such impoundment shall be required to comply with appropriate post-closure requirements, including but not limited to ground water monitoring the corrective action.

(10) Any incremental cost attributable to the requirements of this subsection or section 6924(*o*) of this title shall not be considered by the Administrator (or the State, in the case of a State with an authorized program under section 1342 of Title 33) –

(A) in establishing effluent limitations and standards under section 1311, 1314, 1316, 1317, or 1342 of Title 33 based on effluent limitations guidelines and standards promulgated any time before twelve months after November 8, 1984; or

(B) in establishing any other effluent limitations to carry out the provisions of section 1311, 1317, or 1342 of Title 33 on or before October 1, 1986.

(11)(A) If the Administrator allows a hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e) or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsections) to be placed in a surface impoundment (which is operating pursuant to interim status) for storage or treatment, such impoundments shall meet the requirements that are applicable to new surface impoundments under section 6924(*o*)(1) of this title, unless such impoundment meets the requirements of paragraph (2) or (4).

(B) In the case of any hazardous waste which is prohibited from one or more methods of land disposal under subsection (d), (e), or (g) of section 6924 of this title (or under regulations promulgated by the Administrator under such subsection) the placement or maintenance of such hazardous waste in a surface impoundment for treatment is prohibited as of the effective date of such prohibition unless the treatment residues which are hazardous are, at minimum, removed for subsequent management within one year of the entry of the waste into the surface impoundment.

(12)(A) For the purposes of paragraph (2)(A) of this subsection, the term "liner" means –

(i) a liner designed, constructed, installed, and operated to prevent hazardous waste from passing into the liner at any time during the active life of the facility; or

(ii) a liner designed, constructed, installed, and operated to prevent hazardous waste from migrating beyond the liner to adjacent subsurface soil, ground water, or surface water at any time during the active life of the facility.

(B) For the purposes of this subsection, the term "aggressive biological treatment facility" means a system of surface impoundments in which the initial impoundment of the secondary treatment segment of the facility utilizes intense mechanical aeration to enhance biological activity to degrade waste water pollutants and

(i) the hydraulic retention time in such initial impoundment is no longer than 5 days under normal operating conditions, on an annual average basis;

(ii) the hydraulic retention time in such initial impoundment is no longer than thirty days under normal operating conditions, on an annual average basis: *Provided,* That the sludge in such impoundment does not constitute a hazardous waste as identified by the extraction procedure toxicity characteristic in effect on November 8, 1984; or

(iii) such system utilizes activated sludge treatment in the first portion of secondary treatment.

(C) For the purposes of this subsection, the term "underground source or drinking water" has the same meaning as provided in regulations under the Safe Drinking Water Act (title XIV of the Public Health Service Act) [42 U.S.C.A. § 300f et seq.].

(13) The Administrator may modify the requirements of paragraph (1) in the case of a surface impoundment for which the owner or operator, prior to October 1, 1984, has entered into, and is in compliance with, a consent order, decree, or agreement with the Administrator or a State with an authorized program mandating corrective action with respect to such surface impoundment that provides a degree of protection of human health and the environment which is at a minimum equivalent to that provided by paragraph (1).

Section 3006 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926.

§ 6926. Authorized State Hazardous waste programs

(a) Federal guidelines

Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the development of State hazardous waste programs.

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice

and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

(c) Interim authorization

(1) Any State which has in existence a hazardous waste program pursuant to State law before the date ninety days after the date of promulgation of regulations under section 6922, 6923, 6924, and 6925 of this title, may submit to the Administrator evidence of such existing program and may request a temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subchapter, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subchapter for a period ending no later than January 31, 1986.

(2) The Administrator shall, by rule, establish a date for the expiration of interim authorization under this subsection.

(3) Pending interim or final authorization of a State program for any State which reflects the amendments made by the Hazardous and Solid Waste Amendments of 1984, the State may enter into an agreement with the Administrator under which the State may assist in the administration of the requirements and prohibitions which take effect pursuant to such Amendments.

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

(e) Withdrawal of authorization

Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance

with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(f) Availability of information

No State program may be authorized by the Administrator under this section unless –

(1) such program provides for the public availability of information obtained by the State regarding facilities and sites for the treatment, storage, and disposal of hazardous waste; and

(2) such information is available to the public in substantially the same manner, and to the same degree, as would be the case if the Administrator was carrying out the provisions of this subchapter in such State.

(g) Amendments made by 1984 act

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same

date as such requirement takes effect in other States. The Administrator shall carry out such requirement directly in each and State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984, has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

(h) State programs for used oil

In the case of used oil which is not listed or identified under this subtitle as a hazardous waste but which is regulated under section 6935 of this title, the provisions of this section regarding State programs shall apply in the same manner and to the same extent as such provisions apply to hazardous waste identified or listed under this subtitle.

(As amended Pub.L. 98-616, Title II, §§ 225, 226(a), 227, 228, 241(b)(2), Nov. 8, 1984, 98 Stat. 3254, 3255, 3260;

Pub.L. 99-499, Title II, § 205(j), Oct. 17, 1986, 100 Stat. 1703.)

Section 3008 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928.

§ 6928. Federal enforcement

(a) Compliance orders

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into

account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(b) Public hearing

Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator, shall promptly conduct a public hearing. In connection with any proceeding under this section the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

(c) Violation of compliance orders

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

(d) Criminal penalties

Any person who –

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or

pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter –

(A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or

filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter –

(A) in knowing violation of any material condition or requirement of a permit under this subchapter; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules

For the purposes of subsection (e) of this section –

(1) A person's state of mind is knowing with respect to –

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circumstance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury –

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of –

(A) an occupation, a business, or a profession; or

(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means –

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Civil Penalty

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

(h) Interim status corrective action

(1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

(2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a

time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

Section 4005 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6945.

§ 6945. Upgrading of open dumps

(a) Closing or upgrading of existing open dumps

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the

prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

(b) Inventory

To assist the States in complying with section 6943(a)(3) of this title, not later than one year after promulgation of regulations under section 6944 of this title, the Administrator, with the cooperation of the Bureau of the Census shall publish an inventory of all disposal facilities or sites in the United States which are open dumps within the meaning of this chapter.

(c) Control of hazardous disposal

(1)(A) Not later than 36 months after November 8, 1984, each State shall adopt and implement a permit program or other system of prior approval and conditions to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste due to the provision of section 6921(d) of this title for small quantity generators (otherwise not subject to the requirement for a permit under section 6925 of this title) will comply with the applicable criteria promulgated under section 6944(a) and 6907(a)(3) of this title.

(B) Not later than eighteen months after the promulgation of revised criteria under section 6944(a) of this title (as required by section 6949a(c) of this title), each State shall adopt, and implement a permit program or

other system or prior approval and conditions, to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste due to the provision of section 6921(d) of this title for small quantity generators (otherwise not subject to the requirement for a permit under section 6925 of this title) will comply with the criteria revised under section 6944(a) of this title.

(C) The Administrator shall determine whether each State has developed an adequate program under this paragraph. The Administrator may make such a determination in conjunction with approval, disapproval or partial approval of a State plan under section 6947 of this title.

(2)(A) In any State that the Administrator determines has not adopted an adequate program for such facilities under paragraph (1)(B) by the date provided in such paragraph, the Administrator may use the authorities available under sections 6927 and 6928 of this title to enforce the prohibition contained in subsection (a) of this section with respect to such facilities.

(B) For purposes of this paragraph, the term "requirement of this subchapter" in section 6928 of this title shall be deemed to include criteria promulgated by the Administrator under sections 6907(a)(3) and 6944(a) of this title, and the term "hazardous wastes" in section 6927 of this title shall be deemed to include solid waste at facilities that may handle hazardous household wastes or hazardous wastes from small quantity generators.

Section 3010 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6930.

§ 6930. Effective date

(a) Preliminary notification

Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. Not later than fifteen months after November 8, 1984 –

(1) the owner or operator of any facility which produces a fuel (A) from any hazardous waste identified or listed under section 6921 of this title, (B) from such hazardous waste identified or listed under section 6921 of this title and any other material, (C) from used oil, or (D) from used oil and any other material;

(2) the owner or operator of any facility (other than a single- or two-family residence) which burns for purposes of energy recovery any fuel produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title; and

(3) any person who distributes or markets any fuel which is produced as provided in paragraph (1) or any fuel which otherwise contains used oil or any hazardous waste identified or listed under section 6921 of this title

shall file with the Administrator (and with the State in the case of a State with an authorized hazardous waste program) a notification stating the location and general description of the facility, together with a description of the identified or listed hazardous waste involved and, in the case of facility referred to in paragraph (1) or (2), a description of the production or energy recovery activity carried out at the facility and such other information as the Administrator deems necessary. For purposes of the preceding sentence, the term "hazardous waste listed under section 6921 of this title" also includes any commercial chemical product which is listed under section 6921 of this title and which, in lieu of its original intended use, is (i) produced for use as (or as a component of) a fuel, (ii) distributed for use as a fuel, or (iii) burned as a fuel. Notification shall not be required under the second sentence of this subsection in the case of facilities (such as residential boilers) where the Administrator determines that such notification is not necessary in order for the Administrator to obtain sufficient information respecting current practices of facilities using hazardous waste for energy recovery. Nothing in this subsection shall be construed to affect or impair the provisions of section 6921(b)(3) of this title. Nothing in this subsection shall affect regulatory determinations under section 6935 of this title. In revising any regulation under section 6921 of

this title identifying additional characteristics of hazardous waste or listing any additional substance as hazardous waste subject to this subchapter, the Administrator may require any person referred to in the preceding provisions to file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) the notification described in the preceding provisions. Not more than one such notification shall be required to be filed with respect to the same substance. No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection.

(b) Effective date of regulation

The regulations under this subchapter respecting requirements applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste (including requirements respecting permits for such treatment, storage, or disposal) shall take effect on the date six months after the date of promulgation thereof (or six months after the date of revision in the case of any regulation which is revised after the date required for promulgation thereof). At the time a reguiation is promulgated, the Administrator may provide for a shorter period prior to the effective date, or an immediate effective date for:

(1) a regulation with which the Administrator finds the regulated community does not need six months to come into compliance;

(2) a regulation which responds to an emergency situation; or

(3) other good cause found and published with the regulation.

Section 7002 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972.

SUBCHAPTER VII – MISCELLANEOUS PROVISIONS

§ 6972. Citizens suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section –

(A) prior to 60 days after the plaintiff has given notice of the violation to –

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to –

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606],

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a

removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the

past or present handling, storage, treatment, transportation and disposal of such waste.

EPA Regulations on Prior Notice of Citizen Suits under RCRA, 40 C.F.R. § 254

PART 254 – PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

§ 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

§ 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged violator of any permit, standard, regulation, condition, requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection

Agency for the region in which the violation is alleged to have occurred.

(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement,

or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice.

(c) *Identification of counsel.* The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., and BETTY DAGUE Plaintiffs	)	Civil No. 85-269
v.	)	
CITY OF BURLINGTON, Defendant	)	

COMPLAINT FOR INJUNCTIVE RELIEF, CIVIL PENALTIES, AND DAMAGES

NATURE OF ACTION

1. Plaintiffs bring this civil action against the City of Burlington. As owner and operator of the Burlington Municipal Disposal Grounds (the "Landfill"), the City of Burlington has stored hazardous wastes in the Landfill in violation of Federal and State laws and regulations. The hazardous wastes stored and disposed of in the Landfill have contaminated the soils beneath the Landfill and present an imminent and substantial endangerment to the public health and the environment. In violation of Federal and State laws and regulations, toxic chemicals continue to be discharged from the Landfill into the groundwater beneath and around the Landfill and into the surface waters of a wetland adjacent to the Landfill. In addition, the City of Burlington has continually failed to prevent, *inter alia*, the escape of methane gas from the Landfill and onto Plaintiffs' property.

Accordingly, Plaintiffs seek: an injunction to prevent Defendant from accepting waste of any kind and causing further damage; an order to excavate and properly dispose of all hazardous wastes and contaminated soils in the Landfill; an order to require Defendant to install and operate immediately a groundwater treatment system, approved and subject to the supervision of this Court; and order to remove toxic and other chemicals from the groundwater and surface waters in the vicinity of the Landfill; compensatory and punitive damages; civil penalties, and attorney's fees and costs, as provided by law.

JURISDICTION

2. This action is brought under the citizen suit provisions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* ("RCRA"), and of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (the "Clean Water Act"); Vermont's Groundwater Protection, 10 V.S.A. § 1410; and common law principles of nuisance, negligence, strict liability and trespass; and uncompensated taking of Plaintiffs' property in violation of the Vermont Constitution.

3. Jurisdiction is vested in this Court by RCRA, 42 U.S.C. § 6972(a); by the Clean Water Act, 33 U.S.C. § 1365(a); and by principles of pendent jurisdiction.

4. Venue is proper as Plaintiffs' claims arose in this district.

PARTIES

5. Plaintiffs Ernest Dague, Sr., Ernest Dague, Jr. and Betty Dague are citizens of Vermont, residents of Burlington, Vermont, and contiguous landowners to the Landfill.

6. Defendant, the City of Burlington, has owned and operated the Landfill since at least 1961.

FACTS

LOCATION AND PHYSICAL DESCRIPTION OF THE LANDFILL

7. The Landfill is located on approximately 34 acres of wetland. The Landfill is located to the north of the commercial-residential center of the City of Burlington (See Exhibit A attached hereto).

8. The Landfill site is bounded on the north by the Central Vermont Railway, to the west by the beltline highway (Route 127), and to the south and east by Manhattan Drive.

9. The Landfill is separated from Manhattan Drive, along which Plaintiffs and their neighbors reside, by a steep (approximately 50 feet) elevation drop

10. The Landfill slopes down another 50 feet or so into a wetland commonly known as the Intervale.

11. Future development in the Intervale is zoned for recreation, conservation and open space.

12. The Winooski River is located approximately 3,000 feet east of the Landfill site and Lake Champlain is located approximately 2,600 feet to the south-west.

STORAGE AND DISPOSAL OF HAZARDOUS WASTES IN THE LANDFILL

A. GENERATORS WHICH HAVE DISPOSED OF HAZARDOUS WASTES IN THE LANDFILL

13. Hazardous wastes, as identified and listed pursuant to RCRA and the regulations promulgated thereunder, have been disposed of in the Landfill.

14. According to United States Environmental Protection Agency Notification of Hazardous Waste Site forms, Vermont Agency of Environmental Conservation Hazardous Waste Notification forms, and Company Waste Profile forms, a number of generators of hazardous wastes have disposed of such wastes in the Landfill.

15. Generators of identified and listed hazardous wastes under RCRA that have disposed of such wastes in the Landfill include, but are not limited to, the following companies:

a. The General Electric Company, between 1950 and 1979, disposed in the Landfill at least 200,000 gallons containing the following chemicals: halogenated solvents, electroplating sludge, aluminum plating sludge, cadmium, chromium and lead;

b. The E. B. & A. C. Whiting Company reported in December 1980 that it was disposing in the Landfill approximately 300 pounds per month of heat-treating salt containing cadmium and lead;

c. The Edlund Company, Inc., in 1978, apparently terminated its practice of disposing in the Landfill approximately 264 pounds per year of sodium cyanide;

d. The Hagar Hardware Company, as reported in 1982, was disposing in the Landfill:

i. approximately 85 gallons per year of a chemical consisting of petroleum distillates (kerosene), C-dichlorobenzene, and chlorinated phenols; and

ii. approximately 16 gallons per year of a chemical consisting in part of phenal.

e. The Blodgett Company, Inc., in 1978, reported that it was disposing 13,000 gallons per year of trichloroethylene and approximately 15 gallons per week of toluene in the Landfill.

16. Upon information and belief additional hazardous waste constituents were disposed of in the Landfill between 1977 and 1982, in the form of degreasing solvents, paints, paint solvents and thinners, ink solvents, petroleum-based inks, barium chloride, zinc dust, water soluble oils, cleaning compound, and kerosene.

B. STORAGE AND DISPOSAL OF HAZARDOUS WASTE IN THE LANDFILL BY THE CITY OF BURLINGTON

17. Over a period of years up to and including 1984, the city of Burlington Water Resources Department dumped an indeterminate amount of drums containing anhydrous ferric chloride in the Landfill.

18. The CITY OF Burlington has no immediate plan of action to isolate, contain, and remove the hazardous materials in the Landfill.

ESCAPE OF METHANE GAS FROM THE LANDFILL

19. High levels of methane gas have been released form the Landfill onto the Plaintiffs' land and other contiguous landowners.

20. Methane is a colorless, odorless flammable gaseous hydrocarbon and a byproduct of organic decomposition.

21. Methane gas has seeped into the basement of Plaintiffs' house. The Defendant has installed methane monitoring equipment in the Plaintiffs' house, including a noise alarm set to go off when the gas level reaches explosive levels.

22. Over twenty monitoring wells have been installed throughout the Plaintiffs' yard. During 1985 several of the wells contained methane gas in explosive-level concentrations.

23. In the spring, 1985, the Defendant dug a mammoth hole (approximately 40' x 40' x 30') in Plaintiffs' back yard in search of a methane gas channel.

24. Although the hole was refilled, Defendant has failed to return the Plaintiffs' yard to its condition as it existed prior to the hole excavation.

LEACHATE CONTAMINATION

25. Between 11,000 to 50,000 gallons of leachate – a liquid which percolates through the Landfill mass, and contains soluble and miscible materials from the mass – are produced daily at the Landfill.

26. Groundwater reaches and saturates the lower 9 feet of trash in the Landfill.

27. Hydrologic analyses indicate that the leachate percolates downward and joins existing groundwater flowing in a northerly direction into the Intervale where flow is generally upward, discharging the leachate contaminated groundwater into the surface water of the Intervale.

28. In April of 1984, the Vermont Agency of Environmental Conservation sampled surface water in the Intervale to the north and west of the Landfill for Volatile Organic Compounds ("VOCs"). Results of analyses of the sampling indicated the presence of significant amounts of 1,1 dichloroethane, 1,2 dichloroethane, carbon tetracholoride, benzene and xylene.

29. In October of 1984, the City of Burlington sampled surface water in four locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds.

30. In October of 1984, the City of Burlington sampled groundwater in five monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds.

31. In December of 1984, the City of Burlington sampled surface water in 2 locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds in one of the locations.

32. In December of 1984, the City of Burlington sampled groundwater in four monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of halogenated compounds, lead and tetrahydrofuran.

33. In April of 1985, the Vermont Agency of Environmental Conservation sampled groundwater in five monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of tetrahydrofuran in two of the wells.

34. In April of 1985, the City of Burlington sampled groundwater in six monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of nickel, cyanide, and bis (2-ethylhexyl) phthalate.

35. In April of 1985, the City of Burlington sampled surface water in three locations around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of nickel and cyanide in one of the locations.

36. In June of 1985, the City of Burlington sampled surface water in one location around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of cyanide and phenols.

37. In June of 1985, the City of Burlington sampled groundwater in three monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of cyanide, phenols and lead.

38. In June of 1985, the Vermont Agency of Environmental Conservation sampled groundwater in three monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of tetrahydrofuran in two of the wells.

39. In July of 1985, the City of Burlington sampled groundwater in one monitoring well around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts of lead, cyanide, bis (2-ethylhexyl) phthalate, pentachlorophenal and endosulfan sulfate.

40. In August of 1985, the City of Burlington sampled groundwater in six monitoring wells around the Landfill. Results of analyses of the sampling indicated the presence of significant amounts or nitrates in one of the wells.

41. Dichloroethane belongs to a group of chemicals commonly referred to as aliphatic chlorinated hydrocarbons. 1,1 dichloroethane and 1,2 dichloroethane are volatile, colorless liquids. A National Cancer Institute Study of laboratory rats and mice with orally administered 1,1 dichloroethane found dose-related increases in mammary adenocarcinomas and in hemangiosarcomas and in the incidence of endomentrial stromal polyps as compared to controls. Chronic exposure to 1,2 dichloroethan has been associated with liver and kidney damage. A National Cancer Institute Study found 1,2 dichloroethane to be carcinogenic in laboratory rats and mice, causing squamous – cell carcinomas of the forestomach, hemangiosarcomas, subcutaneous libromas, mammary aoenocarcinomas, endometrial tumors, and alveolar/

bronchiolar adenomas. Severe adverse effects of 1,2 dichloroethane have been observed in humans both in acute and chronic exposure situations, including blood disorders, severe liver and kidney damages and neurological disorders.

42. Benzene is designated as a toxic pollutant under the Clean Water Act, 33 U.S.C. § 1317(a)(1). Benzene is toxic to terrestrial life by ingestion, and highly toxic to aquatic organisms. Benzene has also been shown to cause severe adverse effects on the blood forming organs, resulting in hyperplastic anemia, and decreased red and white blood cell counts. Inhalation exposure of experimental animals to benzene during pregnancy has resulted in birth defects. Benzene has been shown to cause leukemia after prolonged occupational exposures. The International Agency For Research On Cancer has determined that there is sufficient evidence to indicates that benzene is carcinogenic to humans.

43. Occupational exposure to zylene has resulted in immunological disorders and menstrual problems in females. Xylene has also been associated with an increased incidence of cleft palate in offspring of rats which were exposed to orally administered xylene during pregnancy. Xylene is toxic to fish.

44. Lead is designated as a toxic pollutant under the Clean Water Act, 33 U.S.C. § 1317(a)(1). Some toxic effects associated with lead poisoning in humans include anemia, severe intestinal cramps, impaired motor and psychomotor function, paralysis, anorexia, and fatigue. Chronic exposures to lead have been reported to inhibit hemoglobin synthesis. Lead is toxic to aquatic lire.

BIOASSAYS

45. The impacts of the generation and drainage of leachate originating in the Landfill were evaluated through a series of laboratory and field investigations. A field study was conducted by O'Brien & Gere Engineers, Inc. to identify plant and animal life which could be impacted by the leachate. The laboratory investigations were geared toward evaluating the toxicity of the leachate on freshwater aquatic life.

46. Bioassays using leachate contaminated water from the Landfill demonstrate the contaminated leachate to be toxic to plants and animals in the Intervale.

CITY OF BURLINGTON'S VIOLATIONS OF ASSURANCES OF DISCONTINUANCE

47. The City has never been certified by the State to operate a hazardous waste or solid waste facility, as required since 1980 under the State's Hazardous Waste and Solid Waste Management statutes and regulations. The City applied for certification as a solid waste facility in December, 1979, and was denied certification in March, 1980, because the State found that the Landfill was contaminating or would very likely contaminate the Intervale.

48. From March, 1980, to January 1982, the State permitted the City to operate the Landfill without certification. During 1980 and 1981, the City developed a plan for a trash-burning electric plant (a Resource Recovery Facility or "RRF") and, based on the commitment by the City to construct the RRF, the City and the State entered into an Assurance of Discontinuance in December, 1981

(the "First Assurance") and the State issued a Disposal Facility Certification (the "RRF Certification") in January, 1982.

49. The First Assurance required the City, *inter alia*, to cease the disposal of solid waste on July 1, 1984. Only the disposal of ash from the RRF was permitted after that date.

50. The RRF Certification required the City, *inter alia*, to adhere to a specific and extensive water testing schedule and methane gas monitoring program. It is clear that the RRF Certification was drafted primarily to regulate the disposal of ash and not the disposal of solid waste in the Landfill, as well as to address the possibility of contamination of the Intervale.

51. In 1983, the Mayor of Burlington vetoed an Aldermanic Resolution to construct the RRF. The City continued to dispose of solid waste in the Landfill under the RRF Certification until September, 1984, past the July 1, 1984, closure date.

52. The City and State entered into a second Assurance of Discontinuance (the "Second Assurance") in September, 1984, to provide a "limited extended operational period" for the Landfill. Pursuant to the terms of this Second Assurance, the City would upgrade the Landfill for State certification or close it permanently by January 2, 1985.

53. In January, 1985, the City and State again entered into an Assurance of Discontinuance (the "Third Assurance") which, *inter alia*, permits the City to operate

the Landfill as a solid waste facility until at least January, 1987.

54. The City has repeatedly failed to execute its commitments to abide by the terms of all three Assurances and the RRF Certification, and continues to operate the Landfill in violation of State and Federal law (see Exhibit B attached hereto for a listing of violations of the three Assurances).

PLAINTIFF'S DAMAGES

55. As a direct and proximate result of Defendant's wrongful acts and omissions in permitting the escape of methane gas, windblown paper, dust and rodents from the Landfill and onto Plaintiffs' property, Plaintiffs have suffered and will continue to suffer substantial damage, including without limitation the following:

a. Pain and suffering attributable to their physical injuries and impairment;

b. Emotional and psychological injury attributable to the reasonable fear of inhalation of high levels of methane gas;

c. Emotional and psychological injury attributable to the realistic threat of future physical injury, pain and suffering, and economic loss resulting from a methane gas explosion;

d. Diminution of real property values;

e. Property damage arising from Defendant's excavation of their property and illegal operation by Defendant of its Landfill; and

f. A substantial, continuing reduction in the quality of life available to Plaintiffs in their chosen place of residence.

VIOLATIONS OF LAW

COUNT I – VIOLATIONS OF RCRA 42 U.S.C. §§ 6925 AND 6930

56. Plaintiffs incorporate by reference paragraphs 2 through 55 of this Complaint.

57. This count is brought under 42 U.S.C. §§ 6972(a)(1)(A) to enforce the standards, requirements, and prohibitions set forth in 42 U.S.C. §§ 6925(a), and 6930(a), and the regulations promulgated thereunder. RCRA's regulatory scheme is prospective and is designed to prevent future harm from active disposal facilities.

58. Neither the Administrator or the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to comply with the standards, requirements, and prohibitions of RCRA.

59. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would be meaningless.

60. In violation of 42 U.S.C. § 6930(e) and the regulations promulgated thereunder, the City of Burlington has never filed with the Administrator of the United

States Environmental Protection Agency or the State of Vermont a notification stating the hazardous wastes, as identified and listed pursuant to 42 U.S.C. § 6921 and the regulations promulgated thereunder, stored and disposed of in the Landfill.

61. In violation of 42 U.S.C. § 6930(a) and the regulations promulgated thereunder, the City of Burlington is storing and/or disposing identified and listed hazardous wastes in the Landfill.

62. The City of Burlington has never applied to either the Administrator of the United States Environmental Protection Agency or the State of Vermont for a permit to store and/or dispose of hazardous wastes in the Landfill.

63. Between 1976 and November 19, 1980, at least one generator of more than one thousand kilograms per month of hazardous waste had disposed of such waste in excess of one thousand kilograms per month in the soils of the Landfill. In violation of 42 U.S.C. § 6925(a) and the regulations promulgated thereunder, the City of Burlington has continued to store in the Landfill the hazardous waste disposed of by that generator.

64. The Landfill has never been permitted, licensed, or registered by the State of Vermont to manage municipal or industrial solid waste.

65. Small quantity generated hazardous wastes were disposed of in the Landfill after November 19, 1980.

66. In violation of 42 U.S.C. § 6925(a) and the regulations promulgated thereunder, the City of Burlington

continues to store and/or dispose or small quantity generated hazardous wastes in the soils of the Landfill.

67. The Landfill does not have interim status under 42 U.S.C § 6925(e) and the regulations promulgated thereunder.

68. Until the City of Burlington is issued a permit to store and/or dispose of hazardous wastes in the Landfill, the City of Burlington is required under the hazardous waste regulations of RCRA to stop all waste management operations at the Landfill, and send the hazardous wastes in the Landfill to a facility whose owner or operator has interim status or to a storage facility following the Part 262 rules of 40 C.F.R.

COUNT II – VIOLATIONS OF RCRA, 42 U.S.C. § 6945

69. Plaintiffs incorporate by reference paragraphs 2 through 68 of this Complaint.

70. This count is brought under 42 U.S.C. § 6972(a)(1)(A) to enforce the prohibition of open dumping as set forth in 42 U.S.C. § 6945.

71. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or the State of Vermont to require the City of Burlington to stop all waste management operations at the Landfill.

72. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive

notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would be meaningless.

73. The City of Burlington has stored and/or disposed of solid and hazardous wastes in the Landfill since 1961.

74. The Landfill has never received a permit from either the Administrator of the United States Environmental Protection Agency or the State of Vermont to operate as a hazardous waste facility or as a sanitary Landfill.

75. The City of Burlington has been operating the Landfill as an open dump according to 42 U.S.C. § 6945 and the regulations promulgated thereunder.

76. Under the requirements of 42 U.S.C. § 6945, City of Burlington was required to cease its waste management practice or disposal of hazardous waste by October 15, 1979 and to cease its waste management practice or disposal of solid waste by October 15, 1984.

77. The City of Burlington continues to operate the Landfill in blatent violation of 42 U.S.C. § 6945 and the regulations promulgated thereunder.

COUNT III – VIOLATION OF RCRA, 42 U.S.C. § 6972(a)(1)(B)

78. Plaintiffs incorporate by reference paragraphs 2 through 77 of this Complaint.

79. This count is brought under 42 U.S.C. § 6972(a)(1)(B) to abate the substantial and imminent

endangerment to the public health and the environment arising from the hazardous wastes in the Landfill.

80. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to cease all waste management practices at the Landfill and to abate the substantial and imminent endangerment to the public health and the environment arising from the hazardous wastes in the landfill.

81. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of RCRA, so that further notice by Plaintiffs would meaningless.

82. The storage and disposal of hazardous wastes in the Landfill in violation of Subchapter III (Hazardous Waste Management) and of Subchapter IV (Solid Waste Management) of RCRA present an imminent and substantial endangerment to the public health and to the environment in and around the Landfill.

COUNT IV - VIOLATIONS OF CLEAN WATER ACT

83. Plaintiffs incorporate by reference paragraphs 2 through 82 of this Complaint.

84. This count is brought under 33 U.S.C. §1365(a)(1)(A) against the City of Burlington for discharging toxic and other pollutants into a navigable waterway

without first obtaining a permit under 33 U.S.C. §§ 1311, 1317, and 1342.

85. Neither the Administrator of the United States Environmental Protection Agency nor the State of Vermont has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or of the State of Vermont to require the City of Burlington to comply with the standards and limitations of the Clean Water Act.

86. The Administrator of the United States Environmental Protection Agency, the State of Vermont, and the City of Burlington have been on actual or constructive notice of Defendant's violations of the Clean Water Act, so that further notice by Plaintiffs would be meaningless.

87. The Landfill itself and a 48 inch stone arch culvert located in the northwest corner of the Landfill area are point sources of discharge within the meaing of 33 U.S.C. § 1362(14).

88. In violation of 33 U.S.C. §§ 1311, 1317, and 1342, the City of Burlington has discharged and continues to discharge toxic and other pollutants through the Landfill and the 48 inch stone arch culvert into the surface waters of a navigable waterway, the Intervale.

COUNT V - GROUNDWATER PROTECTION

89. Plaintiffs incorporate by reference paragraphs 2 through 88 of this Complaint.

90. This count is brought under the Vermont Groundwater Protection Law. 10 V.S.A. § 1410(c) (Supp. 1985) for equitable relief for the unreasonable harm

caused by the City of Burlington in altering the character or quality of the groundwater beneath and around the Landfill.

91. In 16 V.S.A. § 1410(a)(4), the General Assembly of Vermont declares that "all persons have a right to the beneficial use and enjoyment of groundwater free from the unreasonable interference by other persons."

92. In operating the Landfill the City of Burlington negligently, intentionally and recklessly caused unreasonable harm to the groundwater beneath and around the Landfill.

COUNT VI – COMMON LAW NUISANCE

93. Plaintiffs incorporate by reference paragraph 2 through 92 of this complaint.

94. This count is brought under principles of Vermont common law to abate the public and private nuisance caused by the Landfill and to recover compensatory and punitive damages arising from Defendant's negligent and reckless operation of the Landfill.

95. The storage and disposal of hazardous and toxic materials into the soils of the Landfill, into the surface water of the Intervale, and into the groundwater beneath and around the Landfill constitute public and private nuisances which injure and continue to threaten the natural resources in and around the Landfill and the health, safety and welfare of the people residing adjacent to the Landfill.

96. The continuing and present escape of methane gas, windblown paper, dust and rodents from the Landfill

and onto Plaintiffs' property has substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their property. Plaintiffs have suffered special inconvenience, annoyance, damage and injury not endured by the general public, for which injury and damage they are entitled to recover compensatory and punitive damages.

COUNT VII – COMMON LAW NEGLIGENCE

97. Plaintiffs incorporate by reference paragraphs 2 through 96 of this Complaint.

98. This count is brought under principles of Vermont common law to recover compensatory and punitive damages arising from Defendant's negligent and reckless operation of the Landfill.

99. The Defendant owed a duty of care to Plaintiffs as persons who foreseeably would be injured by the City's acts and omissions in operating the Landfill. The duty of care was created by the common law of negligence as well as the Resource Conservation and Recovery Act of 1976, the Federal Clean Water Act and Vermont's Groundwater Protection law.

100. The Defendant has intentionally, recklessly and negligently breached its duty of care to Plaintiffs in the following material respects:

(a) In its continuing failure to prevent the escape of methane gas from the Landfill and onto Plaintiffs' property;

(b) In its continuing failure to prevent the escape of airborne emission of particulates,

rodents, and windblown paper from the Landfill and onto Plaintiffs' property.

101. In addition to the negligent acts and omissions specified in paragraph 100, Defendant has intentionally, recklessly and negligently violated the following federal and state statutes:

(a) The Resource Conservation and Recovery Act of 1976;

(b) The Clean Water Act;

(c) Vermont's Groundwater Protection Law, 10 V.S.A. § 1410 *et seq.*;

(d) Vermont's Water Pollution Control Law, 10 V.S.A. § 1251 *et seq.*; and

(e) Vermont's Waste Management Law, 10 V.S.A. § 6601 *et seq.*

102. As a direct and proximate result of the City's intentional, reckless and negligent acts and omissions, Plaintiffs have been injured and are entitled to compensatory and punitive damages.

COUNT VIII – STRICT LIABILITY

103. Plaintiffs incorporate by reference paragraphs 2 through 102 of this Complaint.

104. This count is brought under Vermont's law of strict liability to recover compensatory and punitive damages arising from Defendant's operation of the Landfill.

105. Defendant has continually failed to prevent the escape of methane gas from the Landfill and onto Plaintiffs' property. Defendant's conduct constitutes an ultrahazardous or abnormally dangerous activity for which Defendant is strictly or absolutely liable for all damages resulting therefrom.

COUNT IX – COMMON LAW TRESPASS

106. Plaintiffs incorporate by reference paragraphs 2 through 105 of this Complaint.

107. This count is brought under principles of Vermont common law to recover compensatory and punitive damages arising from Defendant's operation of the Landfill.

108. The escape of methane gas, windblown paper and dust from the Landfill onto Plaintiffs' property constitutes an interference with Plaintiffs' right to exclusive possession of their property.

109. Defendants knowingly and willfully permitted the escape of methane gas, windblown paper and dust from the Landfill and onto Plaintiffs' property in such a manner that, in due course, was substantially certain to, and did in fact, invade and cause injury and damages to Plaintiffs' person and property.

COUNT X – UNCOMPENSATED TAKING

110. Plaintiffs incorporate by reference paragraphs 2 through 109 of this Complaint.

111. This count is brought under chapter 1, Article 2nd of the Vermont Constitution to recover just compensation for the Defendant's partial taking of Plaintiffs' property.

112. The health hazards and environmental damage created by the Defendant's operation of the Landfill have substantially diminished the value and use of Plaintiffs' property and, as such, constitute a partial taking of Plaintiffs' property, for which Plaintiffs are entitled just compensation under Chapter I, Article 2nd, of the Vermont Constitution.

RELIEF

WHEREFORE, Plaintiffs request the Court to provide the following relief:

A. Issue a preliminary and permanent injunction which would, at a minimum, order Defendant to:

1) Immediately cease its acceptance of hazardous, solid or any other waste of any kind;

2) Cease the unlawful discharge of hazardous and toxic pollutants into the groundwater beneath and around the Landfill and into the surface waters of the Intervale;

B. Issue an Order directing Defendant to present to the Court within 30 days a plan to excavate and properly dispose of hazardous wastes in the Landfill;

C. Issue an Order directing Defendants not to alter any part of the Landfill without the prior approval of a court-appointed monitor (paid for by Defendant);

D. Issue an Order directing Defendant to present to the Court within 30 days a plan to purge the hazardous and toxic materials from the groundwater beneath and around the Landfill and form the surface waters of the Intervale;

E. Issue an Order to install and thereafter continuously operate a leachate collection drain system;

F. Issue an Order directing Defendants to present to the Court within 30 days a methane gas control and abatement plan to remove all possibility of a methane gas explosion on or near Plaintiffs' property and that of other effective property owners.

G. Issue an Order directing Defendant to report monthly to the court-appointed monitor;

H. Issue an Order directing Defendant to permit the court-appointed monitor to oversee Defendant in Defendant's implementation of corrective measures;

I. Issue an Order directing Defendant to obtain and file a bond or equivalent security with the Court;

J. Impose upon Defendant civil penalties pursuant to 42 U.S.C. § 6928(g) and 33 U.S.C. § 1319(d);

K. Award Plaintiffs all costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 6922(e) and 33 U.S.C. § 1365(d);

L. Award Plaintiffs the sum of $500,000.00 in compensatory damages, and the sum of $500,000.00 in punitive damages;

M. Issue an Order to restore the Plaintiffs' property to its original condition prior to the methane gas exploration.

N. Issue an Order that this Court retain jurisdiction to supervise the carrying out of any order entered by the Court concerning the remedial action to be taken by Defendant; and

O. Any other relief as the Court may deem equitable, just and proper.

Burlington, Vermont.

October 1985.

DOWNS RACHLIN & MARTIN

By: _____

William W. Pearson
Attorney for Plaintiffs
100 Dorset Street
P.O. Box 190
Burlington, Vermont 05402
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs	)	CIVIL NO. 85-269
v.	)	
CITY OF BURLINGTON, Defendant	)	

AFFIDAVIT

I, William W. Pearson, Esquire, affiant, of Charlotte, Vermont, after being duly sworn, state the following under oath:

1. On 8 October 1985 I sent by first-class mail the letter attached hereto as Attachment A to the following individuals:

(a) Honorable Lee Thomas, Administrator
Environmental Protection Agency
401M Southwest
Washington, D.C. 20460 (A100)

(b) Honorable Leonard Wilson, Secretary
Vermont Agency of Environmental
Conservation
State of Vermont
Heritage House
Montpelier, VT 05602; and

(c) Honorable Bernard Sanders, Mayor
City of Burlington
City Hall Burlington, VT 05401

notifying them of my client's intent to file suit under 42 U.S.C. § 6901 *et seq.* ("RCRA") and 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act").

2. On 9 October 1985 my client's suit was filed by hand delivery to the United States District Court for the District of Vermont and, on the same date, the City of Burlington was personally served by hand delivering the Complaint to the City Attorney for the City of Burlington.

3. On 9 October 1985 I sent by registered mail, return receipt requested, a notice of my client's intent to file suit (a copy of which is attached hereto as Attachment B) and a copy of the Complaint to the Office of the Administrator, U.S. Environmental Protection Agency, 401M Southwest, Washington, D.C. 20460.

4. On 9 October 1985 I sent by registered mail, return receipt requested a notice of my client's intent to file suit (a copy of which is attached hereto as Attachment C) and a copy of the Complaint to the Attorney General of the United States, Department of Justice, 10th & Constitution Street N.W., Washington, D.C. 20530.

5. On 10 October 1985 I hand delivered a copy of my client's Complaint to Mr. Jonathan Lash, Commissioner of Water Resources and Environmental Engineering for the State of Vermont in Montpelier, Vermont.

6. On 11 October 1985 I sent by registered mail, return receipt requested a letter (a copy of which is attached hereto as Attachment D) and a copy of the Complaint to the Office of the Administrator, Environmental Protection Agency, Region I, John F. Kennedy Federal Building, Boston, Massachusetts 02203.

Burlington, Vermont. 4th November 1985

/s/ William W. Pearson
William W. Pearson, Esquire, affiant

STATE OF VERMONT
COUNTY OF CHITTENDEN, SS.

On 4th November 1985, William W. Pearson, Esquire, personally appeared before me swearing to the truth of the foregoing.

/s/ Lizabeth Palmer
Notary Public

B82C.29

LAW OFFICE OF
DOWNS RACHLIN & MARTIN

100 DORSET STREET
POST OFFICE BOX 190
BURLINGTON, VERMONT 05402-0190

TELEPHONE (802) 563-2375
TELECOPIER (802) 562-7512
TELEX 92-1857

October 8, 1985

Hon. Lee Thomas, Administrator
of the Environmental Protection Agency
401 M Street, SW
Washington, DC 20460 (A-100)

Hon. Leonard Wilson, Secretary of the
Vermont Agency of Environmental Conservation
State of Vermont
Heritage House
Montpelier, VT 05602

Hon. Bernard Sanders, Mayor
City of Burlington
City Hall
Burlington, VT 05401

Dear Gentlemen:

Pursuant to the provisions of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* ("RCRA"), and of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act") and on behalf of my clients, Ernest Dague, Sr., Ernest Dague, Jr., and Betty Dague, you are hereby notified that the City of Burlington has in the past and is presently

operating its City Landfill in violation of RCRA and the Clean Water Act. In particular, the City of Burlington is in violation of 42 U.S.C. § 6925, 42 U.S.C. § 6930 and 42 U.S.C. § 6945. In addition, the City of Burlington is in violation of 33 U.S.C. § 1311, 33 U.S.C. § 1317, and 33 U.S.C. § 1342.

Sincerely yours,

/s/ William W. Pearson
William W. Pearson

WWP/ms

cc: EPA Regional Office, District I
Hon. Jonathan Lash
Hon. Jeffrey Amestoy

B10L.91

LAW OFFICE OF
DOWNS RACHLIN & MARTIN
PROFESSIONAL CORPORATION

100 DORSET STREET
POST OFFICE BOX 190
BURLINGTON, VERMONT 05402-0190

TELEPHONE (802) 563-2375
TELECOPIER (802) 562-7512
TELEX 92-1857

November 5, 1985

Hon. Lee Thomas, Administrator
of the Environmental Protection Agency
401 M Street, SW
Washington, DC 20460 (A-100)

Hon. Leonard Wilson, Secretary of the
Vermont Agency of Environmental Conservation
State of Vermont
Heritage House
Montpelier, VT 05602

Hon. Bernard Sanders, Mayor
City of Burlington
City Hall
Burlington, VT 05401

Re: Dague, et al. v. City of Burlington

Dear Gentlemen:

On 8 October 1985 I sent to each of you the attached letter notifying each of you of my clients' intent to file suit under 42 U.S.C. § 6972 and 33 U.S.C. § 1365. A copy of the complaint is attached.

Immediately following the filing of the attached complaint, the City of Burlington was personally served by

hand-delivering the complaint to the City Attorney for the City of Burlington. Later the same day, copies of the attached complaint were mailed, return receipt requested, to the Office of the Administrator of the Environmental Protection Agency in Washington, D.C., to the United States Attorney General in Washington, D.C. and to the Office of the Administrator of the Environmental Protection Agency, Region I, in Boston, Massachusetts.

On 10 October 1985, a copy of the attached complaint was hand-delivered to Mr. Jonathan Lash, Commissioner of Water Resources and Environmental Engineering for the State of Vermont in Montpelier, Vermont.

The purpose of this letter is to supplement the detailed notice you have already received concerning the claim being asserted by my clients against the City of Burlington for violations of both the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* and the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.*

The following specific violations are claimed by my clients: 42 U.S.C. § 6925(a), 42 U.S.C. § 6930(a), 42 U.S.C. § 6945, 33 U.S.C. § 1311(a), 33 U.S.C. § 1317, and 33 U.S.C. § 1342.

If you have any questions or wish additional information, please give me a call.

Sincerely yours,

/s/ William W. Pearson
William W. Pearson

enc.

B10L.91

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

AFFIDAVIT OF STEVEN GOODKIND

I, STEVEN GOODKIND, being first duly sworn, hereby depose and state as follows:

1. My name is Steven Goodkind.

2. I am the City Engineer for the City of Burlington.

3. As such I have been directly involved with the operation of the City of Burlington's landfill. I have also been one of the primary technical representatives of the City of Burlington in its relations with the State of Vermont and private engineering firms.

4. In April of 1985, O'Brien & Gere Engineers were authorized to begin final design of the landfill leachate collection system and methane control system and capping.

5. In August of 1985, final plans and specs were received from O'Brien & Gere for the leachate collection and methane control systems.

6. Both systems were accepted so by the State of Vermont as being designed to provide the level of control necessary to achieve compliance with the State Court Order of March, 1985, and the Assurance of Discontinuance.

7. On September 5, 1985, contracts for the leachate collection and methane control systems were sent out to bid.

8. The City executed contracts with Ralph B. Goodrich Company, Inc., on November 11, 1985, for installation of both systems.

9. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers.

10. Installation of the complete, as designed, methane control system was in place and operating prior to March 26, 1985. Final inspection by the manufacturer occurred on March 25, 1986.

11. The leachate collection system began operations on January 15, 1986. On that date, the associated pump station, the function of which was to pump collected leachate to the wastewater treatment plant. Until the pump station was completed on March 6, 1986, collected leachate was trucked to the wastewater treatment plant.

12. The complete, as designed, leachate collection system was in place and operating as of March 7, 1986.

13. I am personally familiar with the design and selection of both systems and based on that familiarity, I can say that the suit by the Dagues, et al, had nothing to do with the decision to install the systems, the design of

the systems, or the decision on when they should be or were installed.

Dated at Burlington, Vermont this 7 day of December, 1989.

/s/ Steven Goodkind
Steven Goodkind

Sworn and subscribed to before me this 7th day of December, 1989.

/s/ Alison Coburn
Notary Public

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

(3)

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM W. PEARSON
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A. WHETHER THE RESPONDENTS' HAZARDOUS WASTE CLAIMS, AS DETERMINED BY THE DISTRICT COURT AND SECOND CIRCUIT, PROPERLY QUALIFIED FOR THE STATUTORY NOTICE AND DELAY EXCEPTION UNDER RCRA (AS EXPLICITLY CONFIRMED BY *HALLSTROM*) WHEN RESPONDENTS ASSERTED THEIR CITIZEN SUIT CLAIMS AGAINST PETITIONER FOR DISPOSING OF HAZARDOUS WASTES IN AND DISCHARGING TOXIC POLLUTANTS FROM PETITIONER'S LANDFILL?

B. WHETHER THE DISTRICT COURT AND SECOND CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE RESPONDENTS SUBSTANTIALLY PREVAILED AND PROPERLY AWARDED THEM COMPENSATORY AND ENHANCED ATTORNEY'S FEES WHEN RESPONDENTS ACHIEVED THE FOLLOWING RESULTS:

1. PETITIONER WAS FOUND TO HAVE COMMITTED FOUR STATUTORY VIOLATIONS OF RCRA AND CWA;
2. PETITIONER WAS ORDERED TO CLOSE ITS LANDFILL;
3. PETITIONER WAS ORDERED TO INSTALL LEACHATE COLLECTION AND METHANE GAS CONTROL SYSTEMS BY A DATE CERTAIN?

QUESTIONS PRESENTED – Continued

C. WHETHER THE PETITIONER, AS DETERMINED BY THE DISTRICT COURT AND SECOND CIRCUIT, DISCHARGED POLLUTANTS FROM A POINT SOURCE INTO WATERS OF THE UNITED STATES WHEN THE PETITIONER DISCHARGED TOXIC POLLUTANTS FROM ITS LANDFILL THROUGH A CULVERT INTO A WETLAND?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 17

A. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the citizen Respondents complied with applicable notice and delay requirements as those terms were interpreted and applied in *Hallstrom v. Tillamook County,* 110 S.Ct. 304 (1989). The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on March 15, 1990 (App. 118-129) and the Second Circuit on June 12, 1991 (App. 10-22)..... 17

1. The facts in this case are significantly distinguishable from the facts in *Hallstrom*. . 17

2. The Second Circuit decision is fully consistent with *Hallstrom*..... 18

3. The Second Circuit is the first and only Circuit since *Hallstrom* to address the statutory notice and delay exception created by Congress for hazardous waste claims under RCRA..... 19

4. There are no conflicts in the Circuits on this issue and the Circuits are not in "hopeless disarray"..... 20

TABLE OF CONTENTS – Continued

Page

5. The result in this case is consistent with RCRA's purpose and effectuates Congress' intent of cleaning up and closing landfills that discharge hazardous wastes and toxic pollutants into the environment. 20

B. The District Court and Second Circuit Court of Appeals fully considered and properly determined that as a matter of fact and law the Respondents substantially prevailed and properly awarded them compensatory and enhanced attorney's fees for achieving the following results: 21

a. Petitioner was found to have committed four statutory violations of RCRA and CWA; 21

b. Petitioner was ordered to close its landfill; and 21

c. Petitioner was ordered to install leachate collection and methane gas control systems by a date certain..... 21

Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on April 2, 1991 (App. 130-134) and the Second Circuit on June 12, 1991 (App. 28-37.)..... 21

1. The Petitioner's claim of "no relief" or "nominal relief" is based on its selective facts woven into an ill-founded argument; the Petitioner's same arguments were made to and rejected by all four judges in both the District Court and Second Circuit. 21

TABLE OF CONTENTS – Continued

Page

C. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the railroad culvert is a point source for the discharge of pollutants from the landfill into waters of the United States based on the discharge from Petitioner's landfill of toxic pollutants through a culvert into a wetland. The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on October 16, 1989 (App. 81-84) and the Second Circuit on June 12, 1991 (App. 22-24)..... 22

1. In its Petition, the Petitioner now asserts new grounds which were not raised or considered below and therefore the Petition should be denied..... 22

2. No significant conflict exists in the Circuits on the interpretation of a point source under the Clean Water Act. 23

3. Petitioner's claim is based on disputed factual assertions which are not reflected in proper judicial findings and do not merit this Court's review..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Hallstrom v. Tillamook County, 110 S.Ct. 304 (1989) . . . *passim*

International Paper Co. v. Ouellette, 107 S.Ct. 805 (1987) 23

Miree v. DeKalb County, Ga., 433 U.S. 25 (1977) 23

National Environmental Foundation v. ABC Rail Corp., 926 F.2d 1096 (11th Cir. 1991) 19

Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991) 19

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 23

Youakim v. Miller, 425 U.S. 231 (1976) 23

STATUTES

Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* 17

33 U.S.C. § 1317(a) 3

Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* 17

3 Vt. Stat. Ann. § 2822(c)(3) 8

OTHER AUTHORITIES

H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6241 20

STATEMENT OF CASE

The City's Petition (hereinafter cited as "Pet. at P."), both in its Statement of Case and throughout its Reasons for Granting Certiorari, is erected on substantial misstatements of fact. These misstatements are:

1. Patently false on the face of the record;
2. Misleading by omission of essential related facts;
3. Directly contradicted by the extensive stipulation of facts submitted by the parties in the District Court;
4. Newly asserted for the first time in the Petition and not part of any proceeding below; or
5. A combination of the above.

Throughout its Statement of Case, the Petitioner creates further confusion by intermixing its factual assertions with legal arguments. The end effect of the City's series of misstatements and intermixing of fact with argument is to present a factual record which is inaccurate, misleading and unreliable. This is reason enough for why the City's Petition should be denied.

The following factual summary and analysis is based on the record below incorporating the District Court's Findings which were adopted by the Second Circuit *in toto*. Record cites are to the District Court's numbered Findings of Fact (FOF) found in Petitioner's Appendix (App. 89-114), the Joint Appendix (JA) filed in the Second Circuit or court documents in Petitioner's Appendix (App. 1-279).

The Respondents are owners of residential property located on Manhatten Drive overlooking and contiguous to the Landfill. (App. 89, FOF 1) The City has owned and operated the Landfill since at least 1961. (App. 89, FOF 2). The Landfill is rectangular in shape and is approximately eleven acres in size. (App. 89, FOF 3-4) The area adjacent to and north of the Landfill is commonly known as the Intervale which is in the flood plain of the Winooski River (App. 89-90, FOF 7 & 9) The Intervale is a wetland: it is inundated or saturated by surface water sufficient to support, and under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, *i.e.*, a cattail marsh. (App. 90, FOF 12). While such a marsh tends to be resistant to toxic chemicals, the marsh is a "climax system, *i.e.*, cattails can stand in the face of chemical insult, but when deterioration of them finally can be seen, they will degrade quickly, and that will be 'long past the point * * * of saving the system.' " (App. 27-28)

Groundwater flows generally south to north and northwest beneath the Landfill. (App. 90, FOF 17) Trash is buried in the Landfill at a depth of approximately nine feet above the groundwater table on the southern edge of the Landfill, and at a depth of approximately nine feet below the groundwater table on the northern edge of the Landfill. (App. 90-91, FOF 18) As a result groundwater mixes and flows through contaminants in the Landfill. (App. 91, FOF 19) From 1950 to May 12, 1982, thousands of gallons of hazardous wastes, in both liquid and solid form, generated by local industries were disposed of in the Landfill.[1] (App. 94-95, FOF 44-50)

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[1] A partial list of these wastes includes: trichloroethylene; paint solvents and lubricating oils; plating or paint sludge

(Continued on following page)

Since at least April, 1972, the City knew that the Landfill was generating leachate. (App. 91, FOF 22). Leachate is liquid that has passed through or emerged from solid waste and contains soluble, suspended or miscible materials removed from such wastes. (App. 91, FOF 21) Leachate volume at the Landfill is generated by either percolation of precipitation into the Landfill mass (about 11,000 gal./day in 1984) or by groundwater moving through the Landfill mass (at 1,000-4,000 gal./day in 1984). (App. 91, FOF 23 & 25) Leachate tests taken by the City in 1980 revealed that the leachate being discharged through the culvert into the marsh and under the railroad grade was the most concentrated leachate found anywhere in the state. (App. 97-98, FOF 66) As of June, 1980, the City knew that very contaminated water was being discharged into the wetland directly downgradient from the Landfill. (App. 98, FOF 67) Landfill leachate contains chemicals and compounds found on toxic and hazardous waste lists under RCRA and the CWA, including the "toxic pollutants" list designated by the EPA Administrator pursuant to 33 U.S.C. § 1317(a).[2] (App. 92, FOF 30-33)

(Continued from previous page)

solids containing cadmium, chromium, lead, sulfuric acid and/or chromium; degreasing solvent-soaked rags, heat-treating salt containing lead, barium, cadmium, chromium, arsenic and mercury; kerosene; lacquer thinner; washing solvent containing trichloroethylene; toluene; sodium cyanide; degreaser containing trichloroethylene, toluene, and sodium cyanide. (JA 204, 238-239)

[2] CWA toxic pollutants found in and around the Landfill include: carbon tetrachloride, benzene, lead, toluene, cyanide,

(Continued on following page)

Leachate from the Landfill was evaluated for toxicity to freshwater aquatic life, using standard bioassay techniques. (App. 93, FOF 36) These tests indicated that the leachate was toxic to freshwater aquate life, *i.e.*, the fathead minnow (a vertebrate in the food chain), water flea and algae. (App. 27, 93, FOF 37) The amount and presence of toxic chemicals, including lead, found in groundwater wells increased over time and were bioaccumulating in the Intervale. (App. 27)

In 1978, the City was notified of an explosive methane gas problem at the landfill. (App. 109, FOF 129) Concentrations of explosive gas generated by the Landfill exceeded the "lower explosive limit" for the gas at the Landfill boundary. (App. 99, FOF 82) In 1984 the City installed 40 methane gas monitoring wells at and beyond the Landfill boundary which established that the flow of methane gas moved away from the Landfill boundary. (App. 99, FOF 80-81) Twenty gas monitoring wells were

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(Continued from previous page)

phenol, pentachlorophenol, endosulfan sulfate, 1,1 dichloroethane, 1,2 dichloroethane, and 1,1,1 trichloroethane. (FOF 33, App. 92-93)

In addition, surface water samples commonly contained: 1,1 dichlorethane, 1,2 dichlorethane, carbon tetrachloride, benzene, xylene, halogenated organic compounds, tetrahydrofuran, nickel, cyanide, phenols and 1,1,1 trichloroethane. (FOF 31, App. 92)

Groundwater samples commonly contained: halogenated compounds, lead, tetrahydrofuran, nickel, cyanide, bis (2-ethylhexyl) phathalate, phenols, 1,2 dichloroethane, pentachlorophenal, endosulfan sulfate and nitrates. (FOF 32, App. 92)

installed through the Respondent Dagues' yard. (App. 102, FOF 88) From November, 1984 until August, 1985 the City recorded at least 829 separate readings on the Respondent Dagues' property above the lower explosive level of methane gas. (App. 102, FOF 86) Of the other gas test wells installed on non-Dague properties, the City recorded in the same period at least 114 separate readings above the lower explosive level of methane gas. (App. 99, FOF 83) Methane gas generally rises but may move horizontally when the surface of the ground is frozen. (App. 99, FOF 79) Methane gas had seeped into the Respondent Dague's basement. (App. 102, FOF 85) The Petitioner installed a gas warning device in the Respondent Dague's basement set to buzz before the explosive level was exceeded. (App. 102, FOF 87)

The Petitioner never divulges anywhere in its Petition this pervasive, dangerous condition caused by its Landfill methane gas generation nor the fact that the City contested through trial whether its Landfill was the source of methane gas in the Respondent Dague's basement.

The Petitioner's only mention of the methane gas problem relates to the Petitioner's December 27, 1985 "operative date" for its methane gas control system installation upon which the Petitioner partially bases its argument that the Respondents are not prevailing parties for attorney's fee purposes. (Pet. at P. 4, Pet. at P. 7 & P. 23) The "temporary blowers" were installed after Respondents' suit was filed, during the preliminary injunction hearing and at least two months before the permanent system became fully operational. (App. 60-61) In addition, the Petitioner was on notice on February 26, 1986 by

the Magistrate's Report and Recommendation that Petitioner would be ordered to fully install the systems within sixty days of the Order. (App. 60) Just as it did before the District Court and the Second Circuit, the Petitioner argues in its Petition that it fully installed its systems prior to March 25, 1986, that is, just before being ordered to do so by the District Court Order dated March 26, 1986. Therefore, goes the Petitioner's argument, the Respondents gained no relief, did not prevail and are not entitled to attorney's fees. Neither the District Court nor the Second Circuit was fooled by this one-sided recitation of the facts. (App. 30-31 & 130-134)

Beginning in 1981, the Petitioner entered into a series of Assurances of Discontinuance with the state to improve its operations at the landfill, to fix problems at the landfill and to set deadlines for closure. On P. 3-4 the Petitioner omits a significant factual history of its improper operation of its Landfill, its continuing violations of several Assurances and its repeated requests for closure extensions.

In 1980, the state denied the City's application for sanitary landfill certification based on the Landfill's discharge of leachate of significant concentration and indeterminant quantity. (App. 97, FOF 63-65) The City's first Landfill Assurance of Discontinuance with the state was dated December 15, 1981 (App. 103, FOF 99)[3] and required the City to close the landfill by July 1, 1984 unless the City built a Resource Recovery Facility (RRF).

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[3] Contrary to the Petitioner's statement there was no January, 1981 Assurance. (Pet. at P. 5)

(App. 103, FOF 99) Having decided not to build a RRF, the City obtained, through a second Assurance dated September 12, 1984, a "limited extended operation period" until January 2, 1985. (App. 104, FOF 104) On January 31, 1985 the City obtained a third Assurance extending the Landfill closure date to January 1, 1988 unless the City chose again to build an RRF which would permit the City to keep the Landfill open until January 1, 1990. (App. 105-106, FOF 109, 116) If the City chose the RRF option, then the City had to notify the state by July 1, 1987 of this choice or close by January 1, 1988. (App. 106, FOF 116) The City failed to notify the state and did not choose the RRF option. (App. 107, FOF 117) The City did not close the Landfill by January 1, 1988. (App. 108, FOF 123) The January 31, 1985 Assurance required the City to install a leachate collection system by September 1, 1985 and a methane control system by December 2, 1985. (App. 105, FOF 114) The City installed neither system by these deadlines. (App. 105, FOF 114)

The above history reveals that the Petitioner obtained extension after extension of its closure date and continued to operate its Landfill, even though explosive levels of methane continued to migrate beyond the Landfill boundary and leachate containing hazardous wastes and toxic pollutants continued to be discharged into the Intervale. After giving statutory notice to the appropriate parties, Respondents filed suit on October 9, 1985 requesting relief which would force the City to comply with applicable federal and state environmental laws, force the City to install systems for leachate collection and control of methane gas migration and force the City to close its landfill. (App. 244-269)

After several hearings before a magistrate, an extensive, detailed Stipulation of Facts and a trial on the merits, the District Court in two Orders (March 26, 1986 and October 16, 1989) found, *inter alia*, that the City committed four federal environmental statutory violations, ordered the City to install remedial systems and ordered the City to close the landfill by January 1, 1990 without the possibility of extensions. (App. 40-53, App. 59-115)

The Petitioner's characterization of the District Court's Order on page 8 of its Petition is false, incomplete and misleading.[4] First, the Petitioner attempts to characterize the January 1, 1990 closure date as a state court ordered mandate to support its later argument against the Respondents' attorney fee award. The Petitioner omits that the District Court directly rejected Petitioner's argument that the January 31, 1985 Assurance and accompanying March 7, 1985 order resulted from a diligent state prosecution of a civil action to force the Petitioner to comply with federal law. On April 18, 1989, Magistrate Niedermeier issued a Report and Recommendation ruling the involvement of the state court was "mainly ministerial – to sign the Assurances of Discontinuance pursuant to 3 V.S.A. § 2822(c)(3)." (JA 163) Rejecting the City's claim that there was "diligent prosecution" by the

[4] In its Petition, Petitioner asserts: "The order required the City to close the landfill by January 1, 1990, the same closing date required by the March 7, 1985 state court order, but did not grant any of the relief sought by the plaintiffs in their action. The court further found, without a hearing on the subject, that the plaintiffs were prevailing parties entitled to attorney's fees to be determined." (Pet. at P. 8)

state, the Magistrate noted the repeated extensions given the City: "The 1981 Assurance of Discontinuance ordered the City to cease accepting refuse at the landfill by July 1, 1984. When the state agency still permits the landfill to remain open in 1988, there remains the question of reasonable 'diligence' by the state in prosecuting an action against the City." (JA 164-165) The City never appealed the Magistrate's Report and Recommendation on this issue. (JA 12) The Second Circuit likewise rejected the Petitioner's "court order" argument when it determined that other than a belated legal action on the Assurance related to the remedial systems, "the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the city numerous extensions." (App. 20)

The Petitioner makes another slanted argument on the "court order" in a footnote claiming the Second Circuit "speculated" on the reasons for Petitioner's actions.[5] The Petitioner mischaracterizes the Second Circuit's analysis. The Petitioner fails to state that Petitioner first made its "speculation" argument to the District Court claiming the Respondents' lawsuit had no impact at all on Petitioner's behavior. (JA 163) Once rejected by the District Court, the Petitioner made its same "speculation" argument to the Second Circuit, then claiming the District Court was speculating. (App. 31) The Second Circuit considered the complex set of historical facts surrounding

[5] The Petitioner claims: "The court of appeals also speculated that, but for the district court order, the City would not have complied with the state court order to close the landfill by January 1, 1990." (Footnote 16, Pet. at P. 12)

the Petitioner's behavior and also rejected the Petitioner's "speculation" argument. (App. 31) Contrary to the Petitioner's speculation implication (no factual basis exists to support the court's conclusion) the Second Circuit cited numerous factual and legal reasons in support of its conclusion. (App. 31) With its Petition, the Petitioner seeks a third factual review on the same issue by this Court and thus reinserts its "speculation" argument.

Second, contrary to the Petitioner's characterization of the District Court orders, the Respondents obtained substantial relief: a) closure of the landfill; b) installation of the leachate collection and gas migration control systems; and, 3) Petitioner's compliance with RCRA and CWA. (App. 40-53 and 59-115)

Third, the Petitioner's statement that attorney's fees were awarded without a hearing is false because on December 11, 1989, the District Court held a hearing on Respondents' application for attorney's fee. (JA 15) The Petitioner's characterization wrongly implies that the Petitioner was prevented from challenging the Respondents' fee application. The District Court Order dated October 16, 1989 determined that the Respondents had substantially prevailed in both their RCRA and CWA claims and the Petitioner was ordered to pay Respondents' costs of litigation, including reasonable attorney's fees and expert witness fees. (App. 88-89) On November 1, 1989 Respondents filed their application for fees. (JA 14) The Petitioner filed memoranda on November 13, 1989 and December 8, 1989, totaling more than fifty pages of argument and attachments, opposing Respondents' application for attorney's fees. (JA 255-304) At the December 11, 1989 hearing, the Petitioner presented its

extended argument that the Respondents had not prevailed and should not be awarded fees or, at best, a reduced amount of fees. The District Court rejected the Petitioner's arguments and awarded Respondents their attorney's fees in its Order dated April 2, 1990. (App. 130-134) The Second Circuit affirmed. (App. 28-37)

Significantly on the issue of attorney's fees, the Petitioner only filed an opposition to Respondents' first request for fees. Although Petitioner states in its Footnote 23, Pet. at P. 22, that Respondents have been granted two more attorney's fee awards in this case, the Petitioner fails to disclose that *Petitioner did not file any opposition* to Respondents' subsequent fee requests, one before the District Court and one before the Second Circuit. (App. 38-39; App. 137-138) Thus, both awards were entered unopposed by Petitioner.

The Petitioner's totally irrelevant, never before stated, declaration concerning a possible stipulation of judgment early in the case to save attorney's fees is just more mischaracterization. (Footnote 31, Pet. at P. 24) The case record is absolutely devoid of any suggestion by the Petitioner that it would have stipulated to any judgment. In fact, the Petitioner's "never give an inch" attitude in this case makes its representation transparently suspect.

The City appealed the District Court judgment to the Second Circuit Court of Appeals on four issues. The Second Circuit in a thirty-four page opinion affirmed the District Court "in all respects." (App. 37) Intermixing fact, misstatements and argument, the Petitioner proceeds to attack the content of the Second Circuit opinion in its Statement of Case.

While the Petitioner has not sought certiorari on the "imminent and substantial endangerment" finding affirmed by the Second Circuit, the Petitioner, nevertheless, unfairly mischaracterizes the Second Circuit's holding.[6] After several pages of detailed legal and factual analysis, the Second Circuit concluded that "(B)ased on the foregoing, the district court properly concluded that there were sufficient circumstances that may present an imminent and substantial endangerment to health or the environment." (App. 28) In its decision, the Second Circuit cited specific facts such as the landfill had been leaking hazardous chemicals into the surrounding soil, groundwater and wetland, that the leachate was toxic to freshwater aquatic life including one vertebrate in the food chain, that the toxic chemicals were bio-accumulating and that the cattail marsh was a "climax system" susceptible to quick deterioration when the chemical insult became visible. (App. 27-28) Significantly in its Petition, the Petitioner has *not challenged these factual findings or the judgment* entered against it on this most important federal statutory violation.

The Petitioner attempts to use these false and misleading statements to influence this Court's viewpoint on

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[6] Petitioner claims: "(H)owever, the Court did not identify any specific endangerment or explain why whatever it perceived the endangerment to be was imminent and substantial." (Pet. at P. 7)

"It (Second Circuit) did so by determining to give no meaning to the words "imminent" and "substantial" and reading the statute as authorizing judicial intervention to eliminate any risk posed by toxic wastes." (Pet. at P. 12)

all the arguments raised by the Petitioner. Both the District Court and the Second Circuit analyzed Petitioner's arguments carefully and rejected them. Not liking the results, the Petitioner asserts to this Court a Statement of Case as if the determinations made below did not exist.

Concerning the CWA violation found by the District Court and affirmed by the Second Circuit, the Petitioner proceeds to mischaracterize and distort both courts' findings.[7] The Second Circuit's opinion did not conclude that any facts determined by the District Court were erroneous. In fact, the Second Circuit opinion on the Clean Water Act issue explicitly determined that the District Court " . . . properly applied the statute (Clean Water Act) to findings that were not clearly erroneous." (App. 24) Furthermore, the Second Circuit's conclusion to the entire appeal was "(W)e affirm the judgment of the district court in all respects." (App. 37)

Furthermore, the Petitioner's previous legal position argued below has shifted in this appeal and thus the CWA issue is not properly postured for appellate review. All the cases now relied upon by Petitioner in its Clean Water Act argument (pp 27-30) were *never cited, analyzed or referenced* by Petitioner in any proceeding below, *i.e.*, in its District Court Proposed Conclusions of Law, in its

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[7] Petitioner claims: "The opinion of the Second Circuit corrected the lower Court's erroneous finding that water flows from the landfill into the Intervale through the railroad culvert (App. 84). Instead the Second Circuit correctly observed that "any pollutants in water flowing through the culvert have already entered waters of the United States before they flow through the culvert. (App. 22)" (Pet. at P. 27-28)

Appellant's Brief to the Second Circuit or in its Petition for Rehearing and Suggestion for Rehearing in Banc before the Second Circuit.

In its October 16, 1989 Opinion, the District Court accurately stated that as of that time "(A)lmost all of the requirements of a subsection 1311(a) violation are evident in the facts, without substantial dispute." (App. 82) Having lost twice below, the Petitioner essentially requests this Court to become embroiled in a third factual dispute over the historical and geographical travel route of landfill leachate which the District Court had determined in its fact finding proceedings.

On the notice and delay issue, the Petitioner again distorts the record by omitting important facts and argues in the guise of stating the lower courts' decisions. In two footnotes in support of its allegation that Respondents did not give Petitioner adequate notice, the Petitioner asserts factual problems in Respondents' pleading and proof. The Petitioner leaves out important facts that substantially alter the factual content underlying the courts' decisions. (Footnote 4, Pet. at P. 5-6 & Footnote 10, Pet. at P. 9)

First, the District Court and Second Circuit found sufficient factual support for their conclusion that the Respondents gave the Petitioner adequate notice under RCRA and CWA. (App. 10-17; App. 118-129) Second, Petitioner omits its own significant procedural flaws. The Petitioner did not raise its no specific "endangerment" notice until four years after the Complaint was filed and two months after the District Court's determination that

the Petitioner was liable. (App. 124-125, 127) Furthermore, the Petitioner itself neither averred nor offered proof at any time that it was unaware of the endangerments or that it had not actually received the various notices given to it by the Respondents prior to suit being filed. In fact, in Petitioner's Motion for Summary Judgment filed in the District Court dated December 11, 1989, the *Petitioner conceded pre-suit notice had been received*: "Notice of the alleged violations of Sec. 6925 and 6930 were given to the appropriate parties pursuant to Sec. 6872(b)(1)(A) on October 8, 1985, the day before this action was filed with the Court." (JA 308) In its Statement of Case, the Petitioner tries to reverse this concession. The technical sufficiency of the notice given was a *factual* determination initially made by the District Court and affirmed in all respects as not being clearly erroneous by the Second Circuit.

Two of the most egregious examples of argumentation proffered as objective Statement of Case assertions involve the Petitioner's mischaracterization of the Second Circuit's *Hallstrom* analysis. P. 8-11

> 1. The Petitioner attempts to clothe the Second Circuit Opinion in the pre-*Hallstrom* terminology which had previously split the Circuits, *i.e.*, the pragmatic, discretionary approach to notice and delay requirements as opposed to the strict compliance approach ultimately adopted by this Court in *Hallstrom*. The Second Circuit did not deviate from the *Hallstrom* requirements but instead applied a statutory exception to the strict compliance approach explicitly recognized and confirmed in *Hallstrom*.

2. The Second Circuit Opinion gives considerable weight to the "hybrid complaint" filed by Respondents which did not exist in the *Hallstrom* case. Affirming the District Court decision, the Second Circuit also concluded that in a "hybrid" situation the policy reasons for requiring a delay period, as identified in *Hallstrom*, no longer are necessary given the competing requirements of the statute for quick action when hazardous waste violations are alleged. Petitioner summarily bypasses the District Court's and Second Circuit's "hybrid" analysis in its Statement of Case and attacks these Opinions as having "pragmatically waived" the notice and delay requirements applicable to non-hazardous waste claims. At no place does the Second Circuit assert that its decision constitutes a "pragmatic waiver" of notice and delay requirements in non-hazardous waste claims.

The City vigorously contested the Respondents' claims throughout the life of this lawsuit to the point that the Second Circuit noted:

> "In fact, until the trial in the court below of the federal statutory claims, the city would not even concede either that the decomposition of garbage in the landfill caused the pre-December 27, 1985 explosive levels of methane gas at the landfill boundary, or that leachate, which escaped the leachate collection system, was migrating beyond the landfill boundary." (App.31)

With its Statement of Case, the Petitioner paints a one-sided factual setting as if the Petitioner was still at the trial level asserting and arguing contested facts that supported its position. The Petitioner has not provided

this Court with a Statement of Case which is an accurate summary of the relevant facts or of the treatment accorded those facts by the courts below.

REASONS FOR DENYING THE WRIT

A. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the citizen Respondents complied with applicable notice and delay requirements as those terms were interpreted and applied in *Hallstrom v. Tillamook County*, 110 S.Ct. 304 (1989). The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on March 15, 1990 (App. 118-129) and the Second Circuit on June 12, 1991 (App. 10-22).

1. The facts in this case are significantly distinguishable from the facts in *Hallstrom*.

In *Hallstrom*, the plaintiffs did not make claims respecting hazardous waste violations under subchapter III of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* In addition, plaintiffs in Hallstrom failed to give any notice either to the EPA Administrator or to the state where the violation occurred until after the suit was commenced. *Hallstrom*, 110 S.Ct. at 307-308. In the Respondents' case, the Respondents asserted claims respecting hazardous waste violations under subchapter III of RCRA and gave notice to the City, the State of Vermont and the Administrator of EPA one day prior to filing suit. In addition to the Respondents' hazardous waste claims, the Respondents asserted Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, claims,

Vermont Groundwater Act claims and pendent state claims.

2. The Second Circuit decision is fully consistent with *Hallstrom*.

While *Hallstrom* states that notice and delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen-suit provision, *Hallstrom* also recognized an exception created by Congress to these requirements when hazardous waste violations under subchapter III of RCRA are alleged. *Hallstrom* 110 S. Ct. at 309. It is this exception that the District Court and Second Circuit applied to the Respondents' statutory claims.

Furthermore, the District Court and Second Circuit were faced with a question not presented in *Hallstrom*. Respondents brought claims both for hazardous waste and solid waste violations under RCRA. Analyzing Congressional intent for notice and delay requirements in the context of Respondents' "hybrid" complaint, the District Court held that the delay periods otherwise required before commencing a non-subchapter III suit become inapplicable. (App. 122 and App. 15) Affirming the District Court, the Second Circuit also emphasized the *factual uniqueness* of the Respondents' claims in that "both subchapter III and non-subchapter III claims all arose from the operation of a single facility and are based on the same core of interrelated facts." (App. 17)

Thus the District Court and Second Circuit decisions uphold the strict interpretation given to non-subchapter

III claims while at the same time recognizing and applying the statutory exception to these requirements as acknowledged by *Hallstrom*.

3. The Second Circuit is the first and only Circuit since *Hallstrom* to address the statutory notice and delay exception created by Congress for hazardous waste claims under RCRA.

The Second Circuit decision is the first and only decision made by any Circuit Court on the exception to the notice and delay requirements related to hazardous waste claims under Subchapter III of RCRA. The Petitioner cites two post *Hallstrom* cases to give the appearance of other Circuits in conflict with the Second Circuit decision. Neither case concerns hazardous waste subchapter III claims and their facts are not similar to the facts in this case. *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), involved the Sierra Club's attempt to enjoin the Forest Service's timber management activities under the Endangered Species Act ("ESA") to protect the red-cockaded woodpecker. The only relationship *Yeutter* has to *Hallstrom* was whether the notice requirements under the ESA were to be considered jurisdictional or procedural, an issue not resolved by *Hallstrom*. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096 (11th Cir. 1991) was a Clean Water Act case involving an industrial discharger into Buxahatchee Creek in Calera, Alabama. There is no special significance to this case as it merely followed *Hallstrom* in strict adherence to notice and delay requirements under the CWA and not under Subchapter III of RCRA. Again the facts and claims in that case are very different from the facts and claims in this case.

4. There are no conflicts in the Circuits on this issue and the Circuits are not in "hopeless disarray".

Contrary to Petitioner's hyperbole, there are no conflicts in the Circuits on the *Hallstrom* issues decided by the Second Circuit. Petitioner has not cited one case establishing its alleged conflict. The Second Circuit carefully analyzed *Hallstrom* in detail and certainly did not retrogress to pre-*Hallstrom* rhetoric or analysis. The Circuits are not in "hopeless disarray". In fact, the Second Circuit decision advanced the rationale in *Hallstrom* by providing judicial direction and order on specific issues not faced or addressed in *Hallstrom*.

5. The result in this case is consistent with RCRA's purpose and effectuates Congress' intent of cleaning up and closing landfills that discharge hazardous wastes and toxic pollutants into the environment

When Congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6241. RCRA declares it is national policy, *inter alia*, that waste should be disposed of as to "minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b) By closing the Petitioner's Landfill and causing remedial systems to be installed, the

District Court and Second Circuit decisions are fully consistent with RCRA's national policy and effectively implement Congress' intent in enacting RCRA.

B. The District Court and Second Circuit Court of Appeals fully considered and properly determined that as a matter of fact and law the Respondents substantially prevailed and properly awarded them compensatory and enhanced attorney's fees for achieving the following results:

a. Petitioner was found to have committed four statutory violations of RCRA and CWA;

b. Petitioner was ordered to close its landfill; and

c. Petitioner was ordered to install leachate collection and methane gas control systems by a date certain.

Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on April 2, 1991 (App. 130-134) and the Second Circuit on June 12, 1991 (App. 28-37.)

1. The Petitioner's claim of "no relief" or "nominal relief" is based on its selective facts woven into an ill-founded argument; the Petitioner's same arguments were made to and rejected by all four judges in both the District Court and Second Circuit.

The Petitioner rests its second Question Presented on the singular premise that the Respondents obtained "no relief" or "nominal relief". This Court need not go beyond this inaccurate premise for a sufficient reason to deny the Writ on the question.

Using a lengthy, detailed recitation of historical events set out in memoranda combined with the Petitioner's own "spin" on those events, the Petitioner attempted to persuade both the District Court and the Second Circuit that the Respondent obtained "no relief" or "nominal relief". Following a detailed analysis of Petitioner's facts placed in historical context of Respondents' lawsuit, both courts and four judges unequivocally rejected Petitioner's claim. (App. 28-37; App. 130-134) Having been rejected twice before on the same factual argument, Petitioner now seeks to engage this Court in a third review of complicated historical dates and events to establish that the Respondents gained no relief or nominal relief. As detailed in Respondents' Statement of Case at P. 11 above, the Petitioner has waived this issue by not opposing the subsequent fee requests filed by the Respondents which were granted as unopposed by the District Court and Second Circuit.

C. The District Court and Second Circuit Court of Appeals fully considered and properly determined that the railroad culvert is a point source for the discharge of pollutants from the landfill into waters of the United States based on the discharge from Petitioner's landfill of toxic pollutants through a culvert into a wetland. The Respondents incorporate by reference the well reasoned decisions on this issue rendered by the District Court on October 16, 1989 (App. 81-84) and the Second Circuit on June 12, 1991 (App. 22-24)

1. In its Petition, the Petitioner now asserts new grounds which were not raised or considered below and therefore the Petition should be denied.

All the cases on this issue now cited by the Petitioner in its Petition were *never relied upon, analyzed or cited* by

the Petitioner previously. Neither the District Court nor the Second Circuit read briefs, heard argument or analyzed their decisions related to Petitioner's newly cited cases. This issue should not be reviewed in this posture because the lower courts were not accorded the opportunity to review their merit. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 35 (1977)

Petitioner's newly cited cases pre-date the October 16, 1989 District Court decision and are completely unrelated, factually and legally, to the toxic pollutant discharges at Petitioner's landfill. They all involve whether EPA, as a matter of national policy, should require NPDES permits for all dams that discharge dead fish (biological pollution) or cause water quality changes (low dissolved oxygen, dissolved minerals and nutrients, temperature changes, etc.) Unlike Respondents' case which involves toxic pollutant discharges from a factually unique landfill, these cases address a heavily contested national policy debate over thousands of affected dam facilities which impact a wide variety of non-toxic pollutants.

2. No significant conflict exists in the Circuits on the interpretation of a point source under the Clean Water Act.

As this Court stated in *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 811-812 (1987), "The Act (Clean Water Act) applies to all point sources and virtually all bodies of water." The definition of a point source is broadly interpreted by the courts. *United States v. Earth*

Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979). Very little conflict exists in the Circuits on the definition of a point source. This proposition is supported by the fact that in its Second Circuit Brief the Petitioner *did not offer a single case* in support of its opposition to Respondents' CWA claim.

3. Petitioner's claim is based on disputed factual assertions which are not reflected in proper judicial findings and do not merit this Court's review.

As described above in Respondents' Statement of Case at P. 13, the Petitioner attempts to base a reviewable question on facts which were not determined by the District Court. Furthermore, the Petitioner mischaracterizes a District Court finding as erroneous but corrected by the Second Circuit. No where does the Second Circuit determine that any of the District Court findings are erroneous. The Petitioner's argument is based on an inaccurate premise not supported by the facts as found by the District Court and adopted *in toto* by the Second Circuit.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

WILLIAM W. PEARSON
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel of Record

December, 1991

Supreme Court, U.S.
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No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-218

MICHAEL B. CLAPP*
ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont
05402-0988
Telephone: (802) 864-5751
Counsel for Petitioner

*Counsel of Record

WILLIAM W. PEARSON*
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue
Suite 2100
Tucson, Arizona 85701
Telephone: (602) 620-5520
Counsel for Respondents

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

1. Docket Entries 1
2. Plaintiffs' Complaint filed October 9, 1985, included in Appendix to Petition for Certiorari at pp. 244-269
3. Opinion and Order of United States District Court for the District of Vermont, March 26, 1986, included in Appendix to Petition for Certiorari at pp. 44-53
4. Opinion and Order of Second Circuit Court of Appeals, August 20, 1986, included in Appendix to Petition for Certiorari at pp. 142-144
5. Findings of Fact, Opinion and Order of United States District Court for the District of Vermont, October 17, 1989, included in Appendix to Petition for Certiorari at pp. 59-115
6. Plaintiffs' Application for Attorney's Fees and Costs November 1, 1989 5
7. Memorandum in Support of Application for Fees and Costs, November 1, 1989 7

Volume II

8. Memorandum in Opposition to Application for Fees and Costs, November 13, 1989..... 219
9. Reply Memorandum in Support of Application for Fees and Costs, November 24, 1989 ... 230
10. Supplemental Memorandum in Opposition to Application for Fees and Costs, December 8, 1989 236

TABLE OF CONTENTS – Continued

Page

11. Reply Memorandum in Support of an Award of Fees and Costs, January 3, 1990 282

12. Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990, included in Appendix to Petition for Certiorari at pp. 130-134

13. Petition for Enforcement of Order, April 17, 1990 284

14. Memorandum in Opposition to Plaintiff's Petition for Enforcement of Order, April 27, 1990 287

15. Plaintiffs' Response to Defendant's Opposition to Enforcement of Court Order, May 1, 1990 289

16. Order of the United States District Court for the District of Vermont, May 4, 1990 296

17. Judgment of United States District Court for the District of Vermont, May 7, 1990, included in Appendix to Petition for Certiorari at pp. 116-117

18. Opinion of Second Circuit Court of Appeals, June 12, 1991 included in Appendix to Petition for Certiorari at pp. 1-37

19. Plaintiff's Bill of Costs, June 25, 1991 302

20. Order of Second Circuit Court of Appeals, August 20, 1991 included in Appendix to Petition for Certiorari at pp. 145-146

21. Supplemental Application for Attorney's Fees and Costs, June 25, 1991 311

TABLE OF CONTENTS – Continued

Page

22. Application to Second Circuit Court of Appeals for Attorney's Fees and Costs, June 25, 1991 362

23. Order of United States District Court for the District of Vermont, October 11, 1991, included in Appendix to Petition for Certiorari at pp. 137-138

24. Order of Second Circuit Court of Appeals, October 25, 1991, included in Appendix to Petition for Certiorari at pp. 38-39

DOCKET ENTRIES

Oct. 9, 1985	1	COMPLAINT
March 26, 1986	63	OPINION and ORDER – FSB – Plaintiff's request for preliminary injunctive relief is DENIED and the City cause the Landfill's gas ventilating system and leachate collection system to become fully operational by May 26, 1986. Cy to attys. (P#3) wf.
Oct. 17, 1989	215	FINDINGS OF FACT, OPINION AND ORDER – FSB – Count I; the City of Burlington has not violated 42:6925(a) or 42:6930(a). Count 2; (a) the City was generating methane gas, but abated that practice in 12/85; (b) the City continues to discharge pollutants into waters of the U.S. without permit (40 C.R.F. [sic] § 257.3-3(a)); and (c) the City has not contaminated an underground drinking water source beyond the Landfill boundary. Count 3; the Landfill may present an imminent and substantial endangerment to health or the environment and therefore operates in violation of 42:6972(a)(1)(B). Count 4; the City is violating the Clean Water Act by discharging pollutants into the Intervale without authorization. Count 5; The City is violating Vermont's Groundwater Protection Law by altering the character and quality of the groundwater. It is ordered that the City close the Landfill on or

before January 1, 1990. Civil penalties shall not be imposed pursuant to 42:6928(g) or 33:1319(d). The Court orders Deft to pay the costs of litigation, including attorney and expert witness fees, to be assessed. Cy. to attys.

Nov. 1, 1989 — 216 APPLICATION For Award of Fees and Costs by Pltf.

Nov. 1, 1989 — 217 MEMORANDUM In Support of P#216.

Nov. 13, 1989 — 219 MEMORANDUM in Opposition to Pltfs' Application for Award of Fees and Costs (P#216).

Nov. 24, 1989 — 222 REPLY MEMORANDUM in support of application for award of attys' fees and costs by Pltfs. amn

Dec. 8, 1989 — 224 MEMORANDUM (Supplemental) In Opposition to Request for Atty's Fees of Pltf by Deft. cab

Jan. 3, 1990 — 229 REPLY in support of an award of fees and costs by Pltfs. amn

April 2, 1990 — 232 OPINION AND ORDER – FSB – Pltf shall recover from the Deft the sum of $198,027.50 for attys' fees, plus necessary expenses in the amount of $10,929.66, together with a 25% enhancement of the total attys' fees in the amount of $49,506.87 plus taxable costs. Cys to attys. amn

April 17, 1990 — 233 PETITION for Enforcement of Order by Pltfs. wf

April 27, 1990 — 234 MEMORANDUM in opposition to Pltfs' petition for enforcement of order by Deft (P#233) amn

May 1, 1990 — 238 RESPONSE TO Deft's opposition to enforcement of court order by Pltfs.

May 4, 1990 — 239 ORDER – FSB – Deft's motion for an entry of judgment is granted in part. The pltf's petition for enforcement is denied pending appeal. The court directs the clerk of court to enter judgment as to Cts I, II, III and IV of the court's Opinion and Order, dated 10/16/89 and the Opinion and Order dated 4/2/90. Cys to attys.

May 7, 1990 — 240 JUDGMENT IN A CIVIL CASE – The City of Burlington, VT, close the Landfill on/before 1/1/90. cvl penalties shall not be imposed pursuant to 42 USC 6928(g) or 33 USC 1319(d). The pltfs shall recover from the deft the sum of $198,027.50 for atty fees, plus necessary expenses in the amt of $10,929.66 together with a 25% enhancement of the total atty's fees in the amount of $49,506.87 plus taxable costs. Judgment is entered for the deft as to Ct 1; the deft, in part, and the pltfs, in part, as to Ct II and the pltfs as to Cts III and IV. Notice to Litigators appeal date of 6/6/90. Cys to attys. cab

June 25, 1991 — 248 BILL of Costs by Heather Briggs, atty for pltf. gei

June 25, 1991	249	MEMORANDUM in Support of Bill of Costs (P#248). gei
June 25, 1991	250	SUPPLEMENTAL APPLICATION by pltf for Award of Fees and Costs. gei
Jul. 17, 1991	251	AFFIDAVIT of Heather Briggs, Esq. in support of Bill of Costs with amended cost relative to service fees ($10.98 sought in lieu of $17.25 original claim). rpw
Oct. 15, 1991	256	ORDER – FSB – Pltf shall recover from Deft supplemental atty's fees in the amount of $24,113.00, and supplemental expenses in the amount of $2,707.61, together with a 25% enhancement of the atty's fees or $6,028.25. Cys. to attys. amn

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

PLAINTIFFS' APPLICATION FOR
AWARD OF FEES AND COSTS

Plaintiffs submit this application for their costs of litigation, including attorney and expert witness fees and expenses, incurred in this action. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, provide that the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney and expert witness fees. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

By Order dated 16 October 1989, this Court ordered that such costs and fees were to be paid by Defendant in an amount to be assessed by the court. Plaintiffs' counsel pursued Defendant's statutory liability on a contingency fee basis. Indeed, to date, Plaintiffs' counsel has not received any payment for its services. In support of this application, Plaintiffs submit affidavits and other documentation to substantiate the requested fees and expenses.

WHEREFORE, Plaintiffs respectfully request that, based upon the attached affidavits of counsel, legal memorandum and other supporting documents, attorneys fees in the amount of $198,027.50 be awarded to Plaintiffs and that this amount be enhanced 100% pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). Plaintiffs further request that the court award $7,295.00 for expert witness fees and $3,634.66 for attorneys expenses incurred in this matter.

Burlington, Vermont. 31 October 1989.

DOWNS RACHLIN & MARTIN
Attorneys for Plaintiffs

By: /s/ Richard N. Bland
Richard N. Bland
199 Main Street
P.O. Box 190-0190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs submit this memorandum in support of their application for attorney and expert witness fees and expenses.

I. Statement of Facts

Plaintiffs Ernest Dague, Sr., Ernest Dague, Jr., Betty Dague and Rose A. Bessette brought this action against the City of Burlington, Vermont ("the City") for alleged violations of federal and state law arising out of the operation of the Burlington Municipal Disposal Grounds ("the Landfill"). Plaintiffs commenced this action under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under pendent state claims. Plaintiffs sought injunctive relief, imposition of civil penalties, compensatory and punitive damages for their pendent state claims, costs, and attorneys fees.

Trial by court was held from May 8 – 11, 1989, on Defendant's statutory liability under RCRA and the CWA, and Vermont's Groundwater Protection Law, 10 V.S.A. § 1410. On 16 October 1989, the Court issued its Findings of Fact, Opinion and Order, finding Defendant liable on four of the five statutory counts of Plaintiffs' Complaint. Specifically, the Court concluded: the City generated methane gas in violation of 42 U.S.C. § 6945(a) and 40 C.F.R. § 257.3-8(a)(2), until December 27, 1985; the City continues to discharge pollutants into the waters of the United States without a NPDES permit, in violation of 42 U.S.C. § 6945(a), 40 C.F.R. § 257.3-3(a), and 33 U.S.C. § 1311; and the City's Landfill may present an imminent and substantial endangerment to public health or the environment, and therefore its continued operation violates 42 U.S.C. § 6972(a) (1) (B). The Court further found that the City is violating Vermont's Groundwater Protection Law, by altering the character and quality of the groundwater beneath and north of the Landfill. The Court ordered the City to close the Landfill on or before January 1, 1990.

"Having determined that plaintiffs have substantially prevailed in both their RCRA and CWA claims," the Court ordered Defendant to pay the costs of litigation, including reasonable attorney and expert witness fees, to be assessed pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). Plaintiffs now move for an award of their costs of litigation, including attorney and expert witness fees and expenses incurred in this action.

II. Argument and Authority

The starting point for any calculation of attorneys fees is the "lodestar," the product of a reasonable hourly rate and the number of hours reasonably expended on substantive issues on which the petitioner satisfies the statutory threshold of success. *Sierra Club v. EPA*, 769 F.2d 796, 23 ERC 1001, 1002 (D.C. Cir. 1985); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). After the lodestar is calculated, a determination must be made as to whether any enhancement of the lodestar is appropriate. *Sierra Club*, 769 F.2d at 809-10.

A. Calculation of the Lodestar

This Court has already determined that Plaintiffs have substantially prevailed on their federal claims, thereby entitling them to a fully compensatory fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). All that remains to be decided is whether the fees sought by Plaintiffs are based on "reasonable" rates and "reasonable" hours. "In computing the fee, counsel for [Plaintiffs as] prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136, 1147 (D.R.I. 1977) (analysis utilized in civil rights actions applicable to environmental cases) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976)).

Plaintiffs' attorneys have submitted an affidavit stating their rates are those usually charged to clients who pay on an hourly basis, (Exhibit 1), as well as affidavits

from other attorneys in Burlington, Vermont stating that the last applicable rate of $125 per hour for Mr. Pearson while at Downs Rachlin & Martin (he is currently practicing in Tucson, Arizona in the field of environmental law and his current billing rate is $170 per hour), $80 per hour for Mr. Bland and various other rates for Plaintiffs' attorneys and legal assistants are reasonable. (Exhibits 4, 5, and 6). *Blum v. Stenson*, 465 U.S. 886 (1989). Further, Plaintiffs' application is supported by itemized, contemporaneous records for all time expended. (Exhibit 1 and Affidavit of William W. Pearson). The descriptive entries show that all time spent was reasonably necessary.

Accordingly, Plaintiffs submit that the appropriate lodestar is $198,027.50 in attorneys fees.

B. Enhancing the Lodestar

The next step to consider is whether an enhancement of the lodestar amount is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) (*"Delaware Valley II"*); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). An enhancement is appropriate here.

The purpose behind applying an enhancement or multiplier is to attract competent counsel. *SPIRG of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 27 ERC 1409, 1421 (3rd Cir. 1988); *Delaware Valley II*, 107 S.Ct. 3078 (1987). Simply stated, if plaintiffs' attorneys can receive as a *maximum* only the lodestar amount, after risking complete nonpayment as well as the hardships

imposed by delay, lack of cash-flow, and out-of-pocket expenses, then competent counsel will be reluctant to serve on behalf of private attorneys general. The purpose underlying the "multiplier" is to balance the inherent inequities between plaintiffs and fee-paying defendants and to reward attorneys who take on public interest cases and achieve substantial results.

Some of the factors to consider in determining whether an enhancement is appropriate include: the risk and the amount involved; the novelty of the issues raised or the difficulties in prosecuting the case; the undesirability of the case; the skill required, and the experience and ability of the attorneys; the preclusion from other employment by the attorneys because of this case; the delay; and the results obtained. *Johnson v Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984).

In this case, consideration of the above factors fully supports an enhancement of the lodestar amount by 100%.

1. Contingency/Risk Factor

A major factor in determining whether the fee should be enhanced is whether the fee arrangement with the clients is fixed or contingent. *See Delaware Valley II*. As described in the attached affidavit by Plaintiffs' counsel, all work associated with the Defendant's statutory liability was taken on a contingent fee basis: that is, had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims.

A contingency multiplier is also awarded when necessary to attract competent counsel. *SPIRG of New Jersey, Inc. v. AT&T*, 842 F.2d 1436, 1451 (3rd Cir. 1988). Without a possible adjustment for risk in this case, Plaintiffs "would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* (quoting *Delaware Valley II*, O'Connor, J., concurring).[1]

In this case, it would have been extremely difficult for Plaintiffs to have obtained other local counsel of similar competence[2] who were willing to sue Vermont's largest municipality and pursue their claims under RCRA and the CWA[3] (under this type of fee arrangement), asserting *inter alia* that the City's Landfill may present an imminent and substantial endangerment to public health or the environment and, therefore, should be closed.

The novelty of the issues presented by Plaintiffs' statutory claims, the complexity of RCRA and the CWA, and the magnitude of the regulations thereunder cannot be overstated. A perusal of the case law of citizen suits under RCRA and the CWA reveals how few, if any, citizens have (1) commenced an action with the statutory claims presented here and (2) prevailed on those claims.

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[1] The outlay of out-of-pocket expenses alone in this type of action would be prohibitive for most attorneys in the Burlington area.

[2] See attached affidavit of Plaintiffs' counsel for the experience and abilities of Mr. Pearson and Mr. Bland.

[3] It should be noted that neither RCRA nor the CWA afford the prevailing or substantially prevailing party with the right to recover damages.

Moreover, Plaintiffs faced substantial difficulties in prosecuting this case during the past four years. The volume of documents pertaining just to Plaintiffs' statutory claims that were reviewed and analyzed by their counsel are stored in 11 "banker's boxes". A review of the record of this case also reveals how nonresponsive Defendant was to discovery and deadlines, forcing Plaintiffs to file motions to compel discovery and for sanctions. Defendant also vigorously contested facts and liability on each of the statutory claims through the trial on the merits.

2. Delay Enhancer

Under a delay theory of enhancement, all time spent over the life of this matter should be compensated at counsel's *present* hourly rate rather than at an historical rate. By charging the time in such a manner, the Court will compensate counsel for the delay in payment during the pendency of this litigation. *See Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6 n.29 (D.C. Cir. 1982) (base amount increased by 25%); *Zipes v. Trans World Airlines*, 846 F.2d 434, 443 (7th Cir. 1988) (Title VII) (1.44 multiplier for delay).

Accordingly, Plaintiffs request that Mr. Pearson's and Mr. Bland's fees be increased a total of $48,081.50 to compensate their time at their present rates ($125/hr. and $80/hr. respectively). Plaintiffs seek no 'delay enhancement' for any other attorney or legal assistant fees charged to this matter.

3. Preclusion from Other Employment

The attached affidavit of Plaintiffs' counsel establishes that most of the hours spent on this matter would have been spent representing other clients who would pay their hourly rates on a monthly basis. Given the substantial devotion of time to this matter, Plaintiffs' counsel were precluded from other employment by fee-paying clients. This factor, too, weighs in favor of enhancement.

4. Conclusion for Enhancement

Based on the foregoing, Plaintiffs submit that their attorneys fees should be enhanced 100%. All of the criteria collectively set forth in *Johnson*, *Hensley* and *Delaware Valley II* have been met and weigh in favor of enhancement. Moreover, such enhancement is warranted by the ever-increasing reluctance of competent and experienced counsel to represent private attorneys general in environmental cases. Without this incentive, it is inevitable that statutes such as the CWA and RCRA will provide (citizens) rights without remedies. Plaintiffs' attorneys will not take cases such as this one unless they can expect to receive more than their hourly rate for time expended.

C. Expert Witness Fee

Plaintiffs' expert witness, Dr. Frank Reed, billed Plaintiffs for 140.5 hours at $50.00/hr. on this matter since 24 October 1985 for a total of $7,025.00. Dr. Reed also charged Plaintiffs $220.00 for mileage and $50.00 for

meals. Thus, Plaintiffs have incurred a total of $7,295.00 in expert witness fees and expenses. (See Exhibit 2 attached to Affidavit of Plaintiffs' counsel for Dr. Reed's invoices). Plaintiffs submit that Dr. Reed's expert witness fees and expenses of $7,295.00 are reasonable and, therefore, reimbursable.

D. Expenses

In addition to attorneys and expert witness fees, Plaintiffs request that they be awarded reasonable expenses, not otherwise recoverable in a bill of costs,[4] incurred in this action. Plaintiffs' counsel has attached an affidavit setting forth that these expenses were necessary and reasonably incurred and has attached copies of applicable bills and receipts, totalling $3,634.66. (Exhibit 3). Accordingly, Plaintiffs request that this amount also be awarded.

An award of costs in this case is not limited to those normally allowed pursuant to 28 U.S.C. § 1920 or F.R.Civ.P. 54. While there are few environmental cases on this point, case law developed under other fee-shifting statutes instructs that all reasonable out-of-pocket expenditures are to be awarded. *Shorter v. Valley Bank and Trust Co.*, 678 F.Supp. 714, 726 (N.D. Ill. 1988) (FLSA); *Reichman v. Bonsignore & Mazzotta*, 818 F.2d 278 (2d Cir. 1987) (citing *Laffey v. Northwest Airlines, Inc.*, 747 F.2d 4, 30 (D.C. Cir. 1984)); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988) (ADEA); *Kossman v. Calumet County*, 849

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[4] Plaintiffs will submit a Bill of Costs upon entry of judgment.

F.2d 1027, 1030 (7th Cir. 1988) (ADEA); *Hidle v. Geneva County Board of Education*, 681 F.Supp. 752, 758 (D.C. Ala. 1988); *Laffey*, 746 F.2d at 30; *Thompson v. Sawyer*, 586 F.Supp. 635, 643 (D.D.C. 1984) (Title VII); *Planells v. Howard University*, ___ F.Supp. ___, 34 FEP 66, 71 (D.C.D.C. 1984) (Title VII); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 289 (N.D. Ill. 1983) (ADEA).

Courts addressing claims under environmental protection statutes have stated that the general policies underlying awards of fees and expenses in civil rights cases apply to similar fee requests under environmental statutes. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 24 E.R.C. 1577 (1986) ("*Delaware Valley I*"); *SPRIG* [sic] *of New Jersey v. AT&T*, 842 F.2d 1436, 1439 n. 1 (3rd Cir. 1988); *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136 (D.R.I. 1977).

Courts resolving fee issues under the Clean Air Act 42 U.S.C. § 7607(f), a fee shifting statute substantially similar to the fee shifting provisions in RCRA and the CWA, *SPIRG of New Jersey*, 842 F.2d at 1439 n. 1, have awarded costs similar to those requested by Plaintiffs here. *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985) (awarding telephone, photocopying, postage costs); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6-8 (D.C. Cir. 1982) (travel, postage, copies of legislative history and transcript expenses awarded). All expenses requested by Plaintiffs are therefore reimbursable.

III. CONCLUSION

Plaintiffs respectfully request the Court to award attorneys fees in the amount of $198,027.50 and enhance said fees 100%, to award $7,295.00 for expert witness fees and $3,634.66 for expenses, and to permit Plaintiffs to supplement their application consistent with future proceedings to be held in this case for any fees later incurred.

Burlington, Vermont. 31 October 1989.

DOWNS RACHLIN & MARTIN
Attorneys for Plaintiffs

By: /s/ Richard N. Bland
Richard N. Bland
199 Main Street
P.O. Box 190
Burlington, Vt 05401-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR. BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II BETTY DAGUE and ROSE A. BESSETTE	)	
v.	)	Civil Action No. 85-269
CITY OF BURLINGTON	)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

STATE OF VERMONT)
CHITTENDEN COUNTY,) SS.

Richard N. Bland, being duly sworn, deposes and states as follows:

1.

I am an associate in the law firm of Downs Rachlin & Martin, attorneys for Plaintiffs in this action. This affidavit provides the specification and itemization necessary for recovery of costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2.

Attached hereto as Exhibit 1 are the billing statements by this law firm for legal services performed in this action. These billings are accurate and true representations of work actually performed, compiled from time slips prepared by the attorney or legal assistant performing the work described. Time slips are prepared by each attorney and legal assistant on a daily basis and reflect actual time spent on the matter, as well as a description of the work performed. As shown in Exhibit 1, the total amount of Plaintiffs' attorneys fees incurred from 3 April 1985 through 30 October 1989 is $198,027.50.

3.

Attached hereto as Exhibit 2 are copies of invoices from Dr. Frank Reed, in connection with his services as an expert witness in this matter. As can be seen, Dr. Reed billed Plaintiffs for 140.5 hours at $50.00 per hour on this matter since 24 October 1985 for a total of $7,025.00. Dr. Reed also charged Plaintiffs $220.00 for mileage and $50.00 for meals. Thus, Plaintiffs have incurred a total of $7,295.00 in expert witness fees and expenses.

4.

Attached hereto as Exhibit 3 are copies of the expense receipts expended by this law firm for expenses in this action, exclusive of any amount to be included in Plaintiffs' Bill of Costs. These receipts are accurate and true representations of expenses actually incurred and total $3,634.66. Certain other expenses were also necessarily incurred for which no receipts are available: (1) telephone $524.30; (2) postage $196.16; (3) mileage $906.36; (4) computer legal research $518.47.[1] These expenses total $2,145.29. Thus, total expenses, not otherwise recoverable in a bill of costs, are $3,634.66.

5.

William W. Pearson served as lead counsel for Plaintiffs in this matter. He was first admitted to the Indiana

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[1] The practice of Downs Rachlin & Martin is to pass necessarily incurred litigation expenses on to fee-paying clients and not to increase hourly rates to absorb such expenses.

Bar and the U.S. District Court, Southern District of Indiana, in 1971; the Vermont Bar in 1975; the U.S. District Court, District of Vermont, in 1977; and the U.S. Court of Appeals, Second Circuit, in 1986. He received his undergraduate degree from University of Chicago in 1968. He then attended Georgetown University Law Center where he received his J.D. in 1971. He is presently a member of the Vermont and American Bar Associations.

Mr. Pearson is an experienced trial attorney in the field of environmental law. His experience with environmental legal problems includes hazardous waste management, toxic torts, NPDES permits, landfills, hazardous waste risk management and commercial lending, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

6.

I assisted Mr. Pearson in this matter. I was first admitted to the Vermont Bar in 1985; the U.S. District Court, District of Vermont, in 1986; and the Supreme Court of the United States in 1989. I received my undergraduate degree from University of Vermont in 1982. I then attended Washington University School of Law where I received my J.D. in 1985. I am presently a member of the Chittenden County, Vermont and American Bar Associations.

I am a trial attorney whose practice is primarily in the field of environmental law. I have experience in resolving environmental legal problems involving hazardous waste management, including the generation,

transportation, storage and disposal of hazardous waste, landfills, RCRA, CWA, Superfund, asbestos, underground storage tanks, hazardous waste risk management and commercial lending, and insurance coverage for environmental claims.

7.

Based upon personal knowledge of hourly rates charged by other attorneys in the Burlington area with similar experience, reputation and skill, I know that rates from $100 – $150 per hour are routinely charged. As shown in Exhibit 1, there are varying levels of rates charged by the law firm of Downs Rachlin & Martin. Work performed by partners is billed at $90 – $150 per hour. Work performed by associates is billed at $60 – $85 per hour, depending on the level of experience. The following is a list of each attorney and legal assistant who worked on this case, the amount of time they spent on this case, and their hourly rates:

William W. Pearson

01-01-89	-	12-31-89	142.50 HOURS AT	125.00 /HR	= 17,812.50
07-01-87	-	12-31-88	143.10 HOURS AT	115.00 /HR	= 16,456.50
07-01-86	-	06-30-87	86.80 HOURS AT	100.00 /HR	= 8,680.00
07-01-84	-	06-30-86	442.40 HOURS AT	85.00 /HR	= 37,604.00

Richard N. Bland

01-01-89	-	12-31-89	294.20 HOURS AT	80.00 /HR	= 23,536.00
07-01-87	-	12-31-88	215.60 HOURS AT	70.00 /HR	= 15,092.00
07-01-86	-	06-30-87	98.40 HOURS AT	65.00 /HR	= 6,396.00

01-01-85 - 06-30-86	661.50 HOURS AT	45.00 /HR	=	29,767.50
Michael J. Case				
01-01-89 - 12-31-89	77.60 HOURS AT	50.00 /HR	=	3,880.00
07-01-89 - 12-31-88	97.50 HOURS AT	45.00 /HR	=	4,387.50
07-01-85 - 06-30-87	593.20 HOURS AT	40.00 /HR	=	23,728.00
07-01-84 - 06-30-85	67.50 HOURS AT	35.00 /HR	=	2,362.50
Paul H. Ode, Jr.				
07-01-84 - 06-30-85	0.50 HOURS AT	55.00 /HR	=	27.50
Robert B. Luce				
07-01-85 - 06-30-86	10.50 HOURS AT	60.00 /HR	=	630.00
Gregory S. Clayton				
01-01-89 - 12-31-89	2.40 HOURS AT	90.00 /HR	=	216.00
07-01-85 - 06-30-86	0.50 HOURS AT	60.00 /HR	=	30.00
Heather Briggs				
01-01-89 - 12-31-89	8.10 HOURS AT	120.00 /HR	=	972.00
John H. Tarlow				
07-01-85 - 06-30-86	13.80 HOURS AT	45.00 /HR	=	621.00
Anita R. Tuttle				
01-01-89 - 12-31-89	26.40 HOURS AT	75.00 /HR	=	1,980.00
Robert A. Miller				
01-01-89 - 12-31-89	9.40 HOURS AT	70.00 /HR	=	658.00
01-01-88 - 12-31-88	21.60 HOURS AT	50.00 /HR	=	1,080.00

Martha L. Judy				
01-01-88 - 12-31-88	17.20 HOURS AT	30.00 /HR	=	516.00
Anthony J. Gallucci				
01-01-89 - 12-31-89	2.10 HOURS AT	45.00 /HR	=	94.50
G. Larry Harvey				
07-01-84 - 06-30-85	26.30 HOURS AT	35.00 /HR	=	920.50
Wynne W. Browne				
07-01-84 - 06-30-86	0.50 HOURS AT	30.00 /HR	=	15.00
Joyce D. Servidio				
01-01-85 - 06-30-86	6.70 HOURS AT	35.00 /HR	=	234.50
David Lowy				
01-01-86 - 12-31-87	11.00 HOURS AT	30.00 /HR	=	330.00

8.

In order to substantiate that the requested hourly rates are reasonable, attached are Exhibits 4, 5 and 6 which are affidavits from attorneys in the Burlington area which set forth their respective billing rates and further indicate the hourly rates for counsel with similar experience, reputation and skill.

9.

My environmental law practice and that of the environmental law group at Downs Rachlin & Martin since I have joined the firm has been limited to representing fee-paying clients, because of the risk associated with the representation of private attorneys general and plaintiffs

on a contingency fee basis. Thus, most of the hours spent on this matter would have been spent representing other clients who would pay our hourly rates on a monthly basis.

Nevertheless, all work associated with Defendant's statutory liability was taken on a contingent basis: had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims. In fact, to date, this firm has not received any payment for its services.

An important factor in this firm's decision to pursue Plaintiffs' statutory claims was the opportunity to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount. This incentive, in my professional opinion, is necessary to attract competent counsel to represent private attorneys general in public interest litigation. Accordingly, I am of the opinion that Plaintiffs would have faced extreme difficulties in finding other local counsel of similar experience to pursue their claims under RCRA and the CWA on an hourly rate to be paid only on the contingency of success.

/s/ Richard N. Bland
Richard N. Bland

Sworn to and subscribed before me this 31 day of October, 1989.

/s/ Lizabeth Palmer
Notary Public
Commission Expires: 2/91

B3.40.1028

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR. BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II BETTY DAGUE and ROSE A. BESSETTE	)	
v.	)	Civil Action No. 85-269
CITY OF BURLINGTON	)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

STATE OF ARIZONA	)		
COUNTY OF PIMA	)	ss	AFFIDAVIT

William W. Pearson, being duly sworn, deposes and states as follows:

1. From the beginning of this action until May 30, 1989, I was a partner in the law firm of Downs, Rachlin & Martin, attorneys for plaintiffs in this action. Since June 1, 1989, I have been with the firm of Molloy, Jones & Donahue in Tucson, Arizona. This affidavit provides additional support for plaintiffs' application for the award of fees and costs pursuant to this Court's Order of October 16, 1989, and 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2. My relevant background is as follows:

A. B.A. degree from University of Chicago in 1968

B. J.D. degree from Georgetown University Law Center in 1971

C. Admitted to Indiana Bar and U.S. District Court, Southern District of Indiana in 1971

D. Admitted to Vermont Bar in 1975 and the U.S. District Court, District of Vermont in 1977

E. Admitted to U.S. Court of Appeals, 2nd Circuit in 1986

F. Admitted to Arizona Bar and U.S. District Court, District of Arizona in 1989

3. I am an experienced trial attorney in the field of environmental law. I have handled a variety of environmental legal problems including hazardous and solid waste management, toxic torts, NPDES permits, landfills, lender liability for environmental hazards, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

4. In practicing environmental law in Vermont, it is my experience that a very high percentage of fee paying clients retain big city, national law firms to do their high stakes, sophisticated environmental work. For example, Downs, Rachlin & Martin is one of only a couple Vermont law firms who are lead counsel for a significant party in Vermont's Superfund sites. The other significant parties are represented by law firms from such places as Boston, New York City, and Washington, D.C. These outside Vermont firms are hired because the laws are complex, the technical issues sophisticated and the financial stakes are high. Commensurate with their experience and expertise, these out-of-state firms charge hourly fees substantially higher than their Vermont counterparts.

5. Presently I am responsible for the environmental practice in Molloy, Jones & Donahue, which is one of the premier law firms in Tucson, Arizona, a city whose population is greater than all of Vermont. I am continuing my environmental law practice in the areas outlined above. My present hourly rate is $170.00 per hour.

6. I have reviewed Exhibit 1 attached to plaintiffs' Application for Award of Fees and Costs. To the best of my knowledge, Exhibit 1 is a fair and accurate itemization of the legal services and costs related to this action for the time period stated therein.

7. Attached to this Affidavit is a supplementary account of legal services provided by me in this action from April 1985 until October 1985. During this time and as part of my routine billing practice at Downs, Rachlin & Martin for this type of case, I kept contemporaneous records of the date and time spent working on this case. While I did not make contemporaneous description entries for the work done, I have reviewed the time and descriptive entries of others and, based upon my best recollection, can state what acts I performed during this time. As the Court can see in comparing my account with the descriptive entries of others in my office working with me on the case, there is a consistent, detailed description of the services provided to the plaintiffs. To the best of my knowledge, information and belief, and herein made under oath, this attached account is a fair statement of the legal services provided by me for the time periods stated therein.

8. Concerning the plaintiffs' application for an enhancement of the fees as stated, it is my considered

judgment that the plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself based on the following:

A. The plaintiffs had no funds with which to pay for legal services on an up-front basis;

B. At the time this suit was brought Attorney Bland and I were among a handful of Vermont lawyers sufficiently sophisticated in this specialized area to handle plaintiffs' claims;

C. Defendant is a political subdivision which does not function or have priorities like a private sector party thereby increasing the uncertainty of strategy and outcome;

D. The enormous up-front expense in this case of services and costs incurred would be prohibitive to all but larger law firms.

9. In summary, in my professional judgment, the total lodestar and enhancement requested are reasonable and appropriate given all the factors listed in the Application itself and in this affidavit.

/s/ William W. Pearson
William W. Pearson

SUBSCRIBED AND SWORN TO before me this 31 day of October, 1989, by William W. Pearson.

My Commission Expires: 3/1/92
/s/ Leslie J. Morse
Notary Public

Sample Entry –

Date:	Atty:	Hours:	Amount:
Description of Services:			
04/03/85	WWP	0.50	221.00
04/04/85	WWP	0.60	
04/05/85	WWP	1.50	
Phone conferences with clients; conferences with clients at their home; review applicable laws and regulations; outline Retainer Agreement			
04/09/85	WWP	0.60	561.00
04/10/85	WWP	3.00	
04/11/85	WWP	1.50	
04/12/85	WWP	1.50	
Phone conferences with clients; conferences with clients at their home; site examination of landfill and surrounding properties; phone conferences with City Attorney's Office; outline document gathering plan; further review of Retainer Agreement			
04/15/85	WWP	3.50	1,198.50
04/16/85	WWP	2.00	
04/17/85	WWP	2.50	
04/18/85	WWP	2.60	
04/19/85	WWP	2.00	
04/23/85	WWP	1.00	
04/29/85	WWP	0.50	
Daily inspections of site to review and record City excavation activity; conferences about same with clients, City officials and State personnel; search for methane gas expert by contacting UVM and Vermont Gas; analyze methane gas data; review Federal and State regulations on methane gas control and standards			

05/02/85	WWP	3.40	544.00
05/03/85	WWP	3.00	

Site visits to review City excavation of landfill looking for unspecified suspected hazardous waste deposit; review same with clients; examine site photos

05/22/85	WWP	0.50	357.00
06/17/85	WWP	1.00	
07/02/85	WWP	0.30	
07/12/85	WWP	0.90	
07/17/85	WWP	1.50	

Phone conferences with clients; site visits with clients; analyze gas data; analyze City damage to client's property from excavation as City replacement soil possibly contained road salts, methane; conferences with City Attorney's office about same; inspect site with City officials; review documents obtained from City

08/05/85	WWP	0.60	467.50
08/13/85	WWP	1.00	
08/20/85	WWP	1.00	
08/21/85	WWP	0.50	
08/25/85	WWP	0.60	
08/30/85	WWP	1.80	

Phone conferences with clients; phone conferences with State officials; review City/State assurances of discontinuance; read statutes and regulations regulating landfill operation

09/03/85	WWP	2.00	2,864.50
09/11/85	WWP	1.50	
09/12/85	WWP	1.50	
09/13/85	WWP	1.20	
09/17/85	WWP	1.50	

09/19/85	WWP	0.50	
09/23/85	WWP	1.00	
09/24/85	WWP	4.00	
09/25/85	WWP	6.00	
09/26/85	WWP	1.00	
09/27/85	WWP	4.50	
09/30/85	WWP	9.00	

In-depth review of statutes and regulations focusing on infraction of Federal and State enforcement programs; review documentation indicating disposal of hazardous waste in landfill; conferences with clients on methane gas problems; phone conferences with State officials on enforcement efforts; outline possible claims against City; analyze City's possible defenses; review Law Review articles and EPA policy statements on landfill regulations; phone conferences with environmental lawyers to obtain "second opinions" on merits of lawsuit; review State's lack of enforcement pattern and whether this provided City a defense; analyze whether State should be made co-defendant; plan further document investigation and interviews with former City employees; organize photograph historical search; organize map search

10/06/85	WWP	4.00	2,040.00
10/07/85	WWP	4.00	
10/08/85	WWP	10.00	
10/09/85	WWP	1.00	
10/10/85	WWP	3.00	
10/11/85	WWP	2.00	

Outline, draft, edit revise Complaint, Motion for Preliminary Injunction, Memorandum in Support of Motion; organize supporting documentation; conferences with clients; organize expert

search through UVM, Vermont Law School and Environmental Defense Fund; further analysis of State inaction and impact on this lawsuit; read numerous cases on CERCLA, RCRA and CWA; analyze merits of suing generators as well as City; review technical data gathered at landfill by City; prepare for preliminary injunction hearing by reviewing pleadings, documents, conferences with witnesses, listing exhibits, outlining witness, testimony, reviewing statutory standards, etc.

TOTAL	97.10	$8,253.50

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

October 30, 1989

MRS. ERNEST DAGUE
BURLINGTON, VT 05401

FILE NUMBER: 2369001

INVOICE NUMBER: 1

FOR THE PERIOD THROUGH October 30, 1989

DAGUE V. CITY OF BURLINGTON

Sample Entry –

Date:	Atty:	Hours:	Amount:
Description of Services:			
04-05-85	MJC	1.30	45.50
INTERVIEW CLIENTS REGARDING CLAIMS AGAINST CITY OF BURLINGTON.			

04-09-85	MJC	4.20	147.00
REVIEW FILE; INTERVIEW ERNIE DAGUE, JR. REGARDING DAMAGES AND CLAIMS AGAINST CITY; INTERVIEW STEVE GOODKIND REGARDING PAST AND FUTURE OPERATION OF LANDFILL; COPY GOODKIND FILE; FACT INVESTIGATION AT STREET DEPARTMENT REGARDING PLANS TO EXCAVATE FOR SEWER PIPE; STATUS REPORT TO ATTORNEY PEARSON REGARDING INTERVIEWS AND FACT INVESTIGATION; ORGANIZE FILE.			
04-10-85	MJC	2.70	94.50
SITE INSPECTION OF LANDFILL; INTERVIEW WITH JIM OGDEN AND BRIAN OSBOURNE OF THE BURLINGTON STREET DEPARTMENT; CONFERENCE WITH CLIENTS REGARDING LITIGATION AGAINST CITY; MEMORANDUM TO ATTORNEY PEARSON REGARDING STATE HAZARDOUS MATERIALS AND SOLID WASTE REGULATIONS; DRAFT MEDICAL RELEASES FOR CLIENTS RESEARCH TO GET LITERATURE ON OTHER TOXIC WASTE LAWSUITS.			
04-11-85	MJC	4.40	154.00
REVIEW LANDFILL NEWS ARTICLES; PHOTOGRAPH DAGUE PROPERTY BEFORE EXCAVATION; CONFERENCE WITH CLIENTS REGARDING RETAINER AGREEMENTS.			
04-12-85	MJC	2.50	87.50
CONFERENCE WITH CLIENTS REGARDING REVISED RETAINER AGREEMENTS; PICK UP CITY ATTORNEY'S LETTER REGARDING INDEMNIFICATION FOR EXCAVATION OF DAGUE PROPERTY.			

04-15-85 PHO 0.50 27.50
ANALYZE MUNICIPAL LIABILITY ISSUES AND REVIEW CASELAW REGARDING SAME; ANALYZE CONVEYANCING ISSUES.

04-15-85 MJC 3.00 105.00
PROPERTY INSPECTION OF CITY EXCAVATION FOR SEWER PIPE; DRAFT MEMORANDUM REGARDING PRINCIPALS IN CASE.

04-16-85 MJC 7.50 262.50
PROPERTY INSPECTION DURING INITIAL SEARCH FOR SEWER PIPE; PHOTOGRAPH SAME; CONFERENCE WITH CLIENTS AND STREET DEPARTMENT PERSONNEL REGARDING METHANE PROBLEM; REPORT TO ATTORNEY PEARSON REGARDING SAME.

04-17-85 MJC 7.50 262.50
PROPERTY INSPECTION DURING RENEWED EXCAVATION FOR SEWER PIPE; PHOTOGRAPH SAME; CONFERENCE WITH STREET DEPARTMENT OFFICIALS AND CLIENTS REGARDING SAME

04-18-85 MJC 5.50 192.50
CONTINUED PROPERTY INSPECTION DURING EXCAVATION OF CLIENTS' LAND; ADDITIONAL PHOTOGRAPHING; CONFERENCE WITH STREET DEPARTMENT PERSONNEL AND CLIENTS REGARDING SAME.

04-19-85 MJC 5.80 203.00
FURTHER PROPERTY INSPECTION AND PHOTOGRAPH SAME; CONFERENCE WITH ATTORNEY PEARSON REGARDING METHANE LEVELS ON DAGUE PROPERTY; DEVELOP TEST FORM FOR CLIENT USE.

04-22-85 MJC 5.30 185.50
DEVELOP FORMS FOR GAS WELL MONITORING; FILL IN ALL TEST DATA; SITE INSPECTION OF CITY WORK ON SEWER EXCAVATION; CONFERENCE WITH JONATHAN LEOPOLD REGARDING ACTION BY BURLINGTON FINANCE BOARD; SEARCH TITLE TO DAGUE PROPERTY; CONFERENCE WITH BURLINGTON ASSESSOR'S OFFICE REGARDING NORTH BOUNDARY LINE OF DAGUE PROPERTY; MEMORANDUM ON DAGUE PROPERTY LINES.

04-23-85 MJC 0.40 14.00
REVIEW LATEST METHANE TEST RESULTS AND ENTER INTO COMPUTER LISTING.

04-24-85 MJC 0.30 10.50
REVIEW PHOTOGRAPHS OF SEWER EXCAVATION

04-24-85 JDS 0.50 17.50
SET UP COMPUTER TO LOG GAS WELL READINGS.

04-29-85 MJC 1.00 35.00
FACT INVESTIGATION AT CITY HALL REGARDING FINANCE BOARD ACTION

05-02-85 MJC 2.00 70.00
SITE INSPECTION OF LANDFILL DURING EXCAVATION FOR HAZARDOUS WASTES; CONFERENCE WITH CLIENTS AND POLICE REGARDING SEARCH; PLAN FURTHER INVESTIGATION; TELEPHONE CONFERENCE WITH LEGAL ASSISTANT LARRY HARVEY REGARDING SEARCH FOR BARRELS OF HAZARDOUS WASTE.

05-02-85 GLH 4.00 140.00
INVESTIGATION INTO CIRCUMSTANCES SURROUNDING EXCAVATION OF CITY LANDFILL NEAR MR. DAGUE'S PROPERTY.

05-02-85 JDS 2.00 70.00
COMPLETE INPUT OF GAS WELL READINGS; DRAFT PRINTOUT OF FIGURES AND GRAPHS OF BASEMENT, CHIMNEY AND WELL #5 READINGS.

05-03-85 MJC 1.80 63.00
CONFERENCE WITH ATTORNEY PEARSON AND CLIENTS REGARDING CLAIMS AGAINST CITY AND CITY'S LIABILITY FOR DAMAGES TO DAGUE PROPERTY; PHOTOGRAPH RECENT EXCAVATION AND RESTORATION OF LAWN.

05-03-85 GLH 1.00 35.00
MEMORANDUM TO FILE REGARDING EXCAVATION AT CITY'S LANDFILL.

05-06-85 MJC 1.60 56.00
REVIEW NOTES; DRAFT MEMORANDUM REGARDING SITE INSPECTION DURING EXCAVATION FOR SEWER PIPE; ADD NEW GAS WELL READINGS TO COMPUTER LIST.

05-07-85 MJC 0.80 28.00
RESEARCH NEWS ARTICLES REGARDING LANDFILL INVESTIGATION; FILE SAME; DRAFT LETTER TO CITY ATTORNEY GRETCHEN BAILEY REGARDING INFORMAL DISCOVERY.

05-07-85 JDS 0.20 7.00
ANALYZE FUTURE USES OF DATABASE ESTABLISHED TO EVALUATE GAS READINGS.

05-09-85 MJC 0.50 17.50
PLAN FOR FURTHER INVESTIGATION AND DISCOVERY; REVISE LETTER TO CITY ATTORNEY.

05-13-85 MJC 0.30 10.50
RECORD NEWS BROADCAST REGARDING WITNESS TO HAZARDOUS WASTE DUMPING AT LANDFILL; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND FURTHER INVESTIGATION.

05-14-85 MJC 0.20 7.00
REVIEW TRANSCRIPT OF NEWS STORY ON HAZARDOUS WASTE AND LANDFILL.

05-15-85 MJC 2.00 70.00
REVIEW AND ANALYZE HAZARDOUS WASTE ISSUES; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING STATUS OF GAS WELL MONITORING AND DISCOVERY FROM CITY; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME; COPY DEEDS; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING OWNERSHIP AND LOCATION OF PROPERTY; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

05-22-85 WWP 0.50 42.50
STATUS CONFERENCE WITH CLIENTS.

05-24-85 MJC 1.00 35.00
ENTER DATA FROM GAS WELL TEST RESULTS INTO COMPUTER FORM; REVIEW GOODKIND LETTER TO CLIENT REGARDING TEST RESULTS FROM DEEP WELL.

05-29-85 MJC 0.80 28.00
REVIEW GRAPHS OF GAS WELL TEST RESULT AMD [sic] ROUTE TO ATTORNEY PEARSON; DRAFT LETTER TO CLIENTS REGARDING STATUS OF CASE.

05-29-85 JDS 1.50 52.50
ADD BASEMENT, CHIMNEY AND WELL READINGS TAKEN BETWEEN 4-22-85 AND 5-21-85 TO EXISTING DATABASE; PRINTOUT REVISED LIST OF READINGS; PRINTOUT GRAPHS OF GAS WELL READING TRENDS FOR BASEMENT, CHIMNEY AND WELL #5.

06-03-85 MJC 0.30 10.50
REVISE STATUS REPORT TO CLIENTS.

06-10-85 MJC 2.70 94.50
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. AND ATTORNEY GRETCHEN BAILEY REGARDING STATUS OF CITY'S REPLACEMENT OF CLIENTS' LAWN; TELEPHONE CONFERENCE WITH LANDSCAPING FIRMS REGARDING FEASIBILITY OF SODDING AND USE; CONFERENCE WITH CLIENTS REGARDING SAME.

06-11-85 MJC 0.50 17.50
ANALYZE POSSIBLE SOLUTIONS TO GRASS-GROWING PROBLEM FOR CLIENTS.

06-13-85 MJC 0.60 21.00
TELEPHONE CONFERENCE WITH ATTORNEY GRETCHEN BAILEY REGARDING CITY'S DECISION ON CLIENTS' LAWN; TELEPHONE CONFERENCE WITH BETTY DAGUE.

06-14-85 MJC 1.00 35.00
TELEPHONE CONFERENCE WITH ATTORNEY GRETCHEN BAILEY REGARDING CITY'S

DECISION ON CLIENTS' LAWN; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

07-02-85 WWP 0.30 25.50
ANALYZE DAMAGES TO CLIENTS' PROPERTY.

07-02-85 MJC 1.20 48.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING RESTORATION OF LAWN, AND OTHER DEMANDS TO CITY; MEMORANDUM REGARDING SAME TO ATTORNEY PEARSON; TELEPHONE CONFERENCE WITH ATTORNEY GRETCHEN BAILEY TO SCHEDULE INSPECTION OF DAGUE PREMISES.

07-09-85 MJC 1.00 40.00
TELEPHONE CONFERENCE WITH ATTORNEY BAILEY REGARDING INSPECTION OF DAMAGE TO DAGUE LAWN; CONFERENCE WITH AND MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME; TELEPHONE CONFERENCE WITH ERNIE DAGUE, SR. REGARDING SAME.

07-17-85 MJC 1.20 48.00
INSPECTION OF DAGUE PROPERTY WITH ATTORNEY PEARSON, ATTORNEY GRETCHEN BAILEY, SID BAKER, CITY ARBORIST, AND DAGUES; CONFERENCE WITH CLIENTS REGARDING CLAIMS AGAINST CITY AND POSSIBLE SETTLEMENT.

07-18-85 MJC 1.60 64.00
LETTER TO CLIENTS REGARDING GAS WELL TEST RESULTS; PHOTOGRAPH PRESENT STATE OF PROPERTY.

08-05-85 MJC 0.30 12.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING FURTHER INVESTIGATION AND STRATEGY.

08-07-85 MJC 1.00 40.00
TELEPHONE CONFERENCE WITH STEVE GOODKIND REGARDING DOCUMENTS AVAILABLE ON OPERATION AND MAINTENANCE OF BURLINGTON LANDFILL; TELEPHONE CONFERENCE WITH ATTORNEY BAILEY REGARDING RESPONSES TO INFORMAL DISCOVERY REQUESTS; TELEPHONE CONFERENCE WITH JIM OLSEN REGARDING REPORT OF SOIL TESTING; TELEPHONE CONFERENCE WITH VAEC REGARDING DOCUMENTS ON BURLINGTON LANDFILL.

08-08-85 MJC 1.00 40.00
COLLECT NEWS ARTICLE ON LANDFILL; TELEPHONE CONFERENCE WITH ERNIE DAGUE, SR. REGARDING DUST FROM LANDFILL; TELEPHONE CONFERENCE WITH STEVE GOODKIND REGARDING SAME; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND DEVELOPMENT OF COMPLAINT; TELEPHONE CONFERENCE WITH VERMONT SOLID WASTE DEPARTMENT REGARDING DOCUMENTS ON LANDFILL.

08-12-85 MJC 7.00 280.00
REVIEW AND REORGANIZE FILE; SEARCH BURLINGTON DEPARTMENT OF HEALTH AND SAFETY FILES ON BURLINGTON LANDFILL; COPY IMPORTANT DOCUMENTS FROM SAME; CONFERENCE WITH STEVE GOODKIND REGARDING COMPLETENESS OF FILE; VISIT LANDFILL SITE AND INSPECT

ASPHALT DEPOSITS; CONFERENCE WITH CLIENTS REGARDING PAST AND PRESENT DEALINGS WITH THE CITY.

08-13-85 MJC 3.50 140.00
RESEARCH STATE SOLID WASTE FILES ON BURLINGTON LANDFILL; CONFERENCE WITH JULIE HACKBARTH REGARDING HISTORY AND FUTURE OPERATION OF BURLINGTON LANDFILL; COPY DOCUMENTS FROM STATE FILES; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

08-14-85 MJC 0.50 20.00
ORGANIZE DOCUMENTS RECEIVED FROM AEC AND CITY.

08-15-85 MJC 1.50 60.00
REVIEW DAGUE GAS WELL READINGS AND TABULATE FOR COMPUTER PROGRAM; REVIEW DOCUMENTS BETWEEN CITY AND STATE REGARDING OPERATION OF LANDFILL; MEMORANDA TO ATTORNEY PEARSON REGARDING FACT INVESTIGATION AND HISTORY OF BURLINGTON LANDFILL.

08-20-85 MJC 0.70 28.00
REVIEW MEMORANDA TO ATTORNEY PEARSON REGARDING LANDFILL AND PROGRESS OF INVESTIGATION; PROCESSING PHOTOS OF LAWN TAKEN ON 8®15®85.

08-21-85 MJC 0.50 20.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING PLAN FOR FURTHER INVESTIGATION.

08-26-85 MJC 7.50 300.00
REVIEW AEC FILES; COPY DOCUMENTS; CONFERENCE WITH RUTH EINSTEIN

REGARDING HAZARDOUS WASTE NOTIFICATION FORMS FILED BY GENERATORS AND POSSIBLE HAZARDOUS WASTE DUMPING AT BURLINGTON LANDFILL.

08-27-85 MJC 3.50 140.00
ORGANIZE FILE; REVIEW DOCUMENTS; CONFERENCE WITH ATTORNEY PEARSON REGARDING NEWLY DISCOVERED EVIDENCE OF IMPROPER OPERATION OF BURLINGTON LANDFILL; TELEPHONE CONFERENCE WITH CLIENTS REGARDING PROGRESS OF INVESTIGATION.

08-28-85 MJC 0.30 12.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION OF FACTUAL SUMMARY AS BASIS FOR LEGAL ACTION.

08-29-85 RNB 4.10 184.50
CONFERENCE WITH ATTORNEY PEARSON REGARDING LEGAL THEORIES TO PURSUE AGAINST CITY AND-OR STATE; REVIEW MEMORANDUM FROM RUTH EINSTEIN, CHRONOLOGY OF LANDFILL VIOLATIONS, AND ARTICLE ON LIABILITY FOR CLEANUP OF HAZARDOUS WASTE DISPOSAL SITES; LEGAL RESEARCH UNDER FEDERAL WATER POLLUTION CONTROL ACT, RESOURCE CONSERVATION AND RECOVERY ACT, AND GROUNDWATER PROTECTION UNDER FEDERAL AND VERMONT LAW.

08-29-85 MJC 1.50 60.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING FACTS FOR COMPREHENSIVE COMPLAINT; REVIEW FILE FOR THAT PURPOSE; REVIEW GAS WELL GRAPHS.

8-29-85 JDS 2.50 87.50
PRINT-OUT AND REVIEW GAS READINGS IN WELL NOS. 6 THROUGH 22.

08-30-85 RNB 6.20 279.00
LEGAL RESEARCH UNDER FEDERAL CLEAN WATER ACT, RESOURCE CONSERVATION AND RECOVERY ACT AND COMMON LAW THEORIES FOR ENVIRONMENTAL HARM.

08-30-85 MJC 0.50 20.00
ANALYZE EPA INVOLVEMENT WITH BURLINGTON LANDFILL OPERATION AND CERTIFICATION.

08-31-85 RNB 3.00 135.00
CONTINUE LEGAL RESEARCH UNDER FEDERAL ENVIRONMENTAL STATUTES AND VERMONT LAW.

09-03-85 RNB 1.30 58.50
CONFERENCE WITH ATTORNEY PEARSON TO ANALYZE LEGAL THEORIES AND FACTUAL INVESTIGATION.

09-03-85 MJC 7.60 304.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING STRATEGY AND DIVISION OF LABOR TO PURSUE CLAIM AGAINST CITY; TELEPHONE CONFERENCES WITH JAMES OGDEN, JONATHAN LEOPOLD, AND ATTORNEY JOSEPH MCNEIL REGARDING APPROPRIATION OF $10 MILLION BOND ISSUE; LETTER TO JONATHAN LEOPOLD AND ATTORNEY MCNEIL.

09-05-85 MJC 6.50 260.00
REVIEW AEC FILES ON BURLINGTON LANDFILL; DRAFT OUTLINE OF VIOLATIONS OF

VERMONT WASTE MANAGEMENT REGULATIONS.

09-06-85 MJC 0.40 16.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING LACK OF COVER OVER GARBAGE AT BURLINGTON LANDFILL AND FUTURE PLANS FOR LEGAL ACTION AGAINST CITY REGARDING LANDFILL.

09-08-85 MJC 1.80 72.00
PHOTOGRAPH BURLINGTON LANDFILL TO SHOW STATUS OF COVERING OPERATION AND PROXIMITY TO POND AND WILDLIFE; INSPECTION OF LANDFILL.

09-10-85 RNB 3.60 162.00
THOROUGH REVIEW AND ANALYSIS OF FACTS AND LEGAL RESEARCH COMPLETED TO DATE.

09-10-85 MJC 5.20 208.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING FURTHER WORK TO BE DONE; REVIEW VAEC FILE ON BURLINGTON LANDFILL AND OUTLINE SAME.

09-11-85 WWP 1.50 127.50
REVIEW LAW REVIEW ARTICLES AND CASES ON RCRA.

09-11-85 RNB 5.40 243.00
LEGAL RESEARCH ON CASELAW UNDER FEDERAL CLEAN WATER ACT AND RESOURCE CONSERVATION AND RECOVERY ACT, AND SOVEREIGN IMMUNITY CASES; REVIEW BURLINGTON'S APPLICATION FOR CERTIFICATION OF LANDFILL; REVIEW

REPORT ON RESOURCE RECOVERY FACILITY.

09-11-85 MJC 7.20 288.00
REVIEW FILE; CORRELATE FACTUAL INVESTIGATION WITH LEGAL RESEARCH IN PREPARATION FOR DRAFTING COMPLAINT; CONFERENCE WITH STEVEN GOODKIND; REVIEW STREET DEPARTMENT FILES AND COPY DOCUMENTS; CONFERENCE WITH CITY CLERK AND COPY DOCUMENTS; CONFERENCE WITH JIM OGDEN; REVIEW AMENDMENTS.

09-12-85 RNB 4.50 202.50
BEGIN DRAFTING MEMORANDUM OUTLINING LEGAL THEORIES TO PURSUE; REVIEW AND ANALYZE ASSURANCES OF DISCONTINUANCE AND HEALTH DEPARTMENT'S FILE REGARDING LANDFILL.

09-12-85 MJC 6.20 248.00
REVIEW FILE; CONFERENCE WITH ATTORNEY PEARSON REGARDING LEACHATE TEST RESULTS NEEDED IN PREPARATION FOR DRAFTING COMPLAINT; REVIEW BURLINGTON HEALTH AND SAFETY FILE AND COPY SAME; REVIEW ASSURANCES OF DISCONTINUANCE AND OUTLINE VIOLATIONS BY CITY OF BURLINGTON.

09-13-85 RNB 5.50 247.50
DRAFT MEMORANDUM ON PRIMARY JURISDICTION AND SOVEREIGN IMMUNITY; CONTINUE REVIEW OF FACT DOCUMENTS.

09-13-85 MJC 0.50 20.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING ORGANIZATION OF FILES.

09-16-85 MJC 4.00 160.00
ORGANIZE FILE; COPY REPORTS RECEIVED FROM VAEC AND RETURN SAME; ORGANIZE VAEC MATERIALS.

09-17-85 RNB .50 22.50
CONFERENCE WITH ATTORNEY PEARSON REGARDING FACT INVESTIGATION AND LEGAL THEORIES.

09-17-85 MJC 6.00 240.00
REVIEW TOXIC WASTE FILE FROM AEC AND DRAFT LIST OF CHEMICALS DUMPED IN BURLINGTON LANDFILL; REVIEW CITY OF BURLINGTON FILES FOR COPY OF FIRST ASSURANCE OF DISCONTINUANCE; CONFERENCE WITH STEVE GOODKIND REGARDING SAME.

09-18-85 MJC 3.50 140.00
REVIEW AEC FILE ON BURLINGTON LANDFILL; COPY DOCUMENTS.

09-19-85 WWP .50 42.50
READ UVM BOTANY STUDENT'S PAPER ON LANDFILL.

09-19-85 MJC 1.00 40.00
ORGANIZE DOCUMENTS RECEIVED FROM VAEC; TELEPHONE CONFERENCE WITH VERMONT MAPPING AGENCY; LETTER TO SAME REGARDING ORTHOPHOTOS OF BURLINGTON LANDFILL TO LOCATE POINT SOURCES.

09-23-85 MJC 1.00 40.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING BACKGROUND FOR DRAFTING COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION.

09-23-85 GLH 0.30 10.50
REVIEW CITY OF BURLINGTON AND STATE OF VERMONT REPORTS ON WATER SAMPLES TAKEN AT DESIGNATED AREAS AROUND LANDFILL OVER THE PAST FEW YEARS AND COMPARE RESULTS WITH THE FEDERAL STANDARDS.

09-24-85 RNB 9.70 436.50
LEGAL RESEARCH ON RCRA'S HAZARDOUS WASTE MANAGEMENT PROVISIONS AND REGULATIONS ON "OPEN DUMPING" OF SOLID WASTES; LEGAL RESEARCH ON VERMONT'S WASTE MANAGEMENT ACT; BEGIN DRAFTING COMPLAINT; FURTHER ANALYSIS OF RCRA REGULATIONS.

09-24-85 MJC 4.20 168.00
DRAFT LETTER TO STATE FOR ORTHOPHOTO MAPS TO BE USED AS TRIAL EXHIBITS; REVIEW ASSURANCES OF DISCONTINUANCE AND DRAFT MEMORANDUM OUTLINING VIOLATIONS OF ASSURANCE BY CITY OF BURLINGTON; DEVELOP FACTUAL ALLEGATIONS FOR COMPLAINT.

09-25-85 RNB 8.60 387.00
CONTINUE LEGAL RESEARCH AND ANALYSIS OF RCRA REQUIREMENTS AND REGULATIONS; CONFERENCE WITH ATTORNEY PEARSON REGARDING COMPLAINT AND DEFENSES THERETO; OUTLINE CITY'S VIOLATIONS OF ASSURANCES OF DISCONTINUANCE.

09-25-85 MJC 6.50 260.00
CONTINUE TO OUTLINE CITY'S VIOLATIONS OF ASSURANCES; REVIEW FILE TO DOCUMENT SAME; PREPARE EXHIBITS FOR USE AS COMPLAINT ATTACHMENTS OR FOR WITNESS EXAMINATIONS; CONFERENCE WITH ATTORNEY PEARSON REGARDING OVERALL STRATEGY AND DIRECTION OF COMPLAINT AND FACTUAL ALLEGATIONS.

09-25-85 GLH 2.00 70.00
IDENTIFY AND LOCATE CITY OF BURLINGTON STREET DEPARTMENT EMPLOYEE WHO OPERATED HEAVY EQUIPMENT AT THE CITY LANDFILL.

09-26-85 WWP 1.00 85.00
ANALYZE FACTUAL ALLEGATIONS OF COMPLAINT AND REVIEW EXHIBITS; TELEPHONE CONFERENCE WITH MR. PURCELL.

09-26-85 RNB 9.80 441.00
DRAFT FACT SECTIONS OF COMPLAINT AND COMPILE SUPPORTING DOCUMENTATION; ANALYZE PLEADING IN ALTERNATIVE UNDER RCRA BASED ON HYBRID STATUS OF LANDFILL.

09-26-85 MJC 8.50 340.00
ASSIST IN DRAFTING COMPLAINT; REVIEW FILE AND VERIFY ALL FACTUAL ALLEGATIONS; REVIEW FEDERAL RCRA REQUIREMENTS AS APPLIED TO BURLINGTON LANDFILL; CONFERENCE WITH ATTORNEY PEARSON REGARDING ALTERNATIVE ALLEGATIONS BASED ON REGULATORY STATUS OF BURLINGTON LANDFILL.

09-27-85 RNB 6.70 301.50
CONTINUE DRAFTING FACT SECTIONS OF COMPLAINT.

09-27-85 MJC 5.50 220.00
REVIEW FILE; SUBSTANTIATE FACTUAL ALLEGATIONS OF COMPLAINT; DRAFT MEMORANDUM REGARDING REGULATORY VIOLATIONS BY CITY; DRAFT LIST OF CITY'S VIOLATIONS OF ASSURANCES FOR ALLEGATIONS IN COMPLAINT.

09-29-85 RNB 6.90 310.50
FINISH DRAFTING AND SUBSTANTIATING FACT SECTIONS OF COMPLAINT.

09-29-85 MJC 5.80 232.00
ANALYZE FACTUAL HISTORY OF BURLINGTON LANDFILL AND ADMISSIONS OF LIABILITY BY CITY AND STATE; REVIEW AND ORGANIZE LANDFILL WATER WELL TEST RESULTS; DRAFT LIST OF EPA CONTAMINANTS FOUND IN LANDFILL TEST RESULTS.

09-30-85 RNB 10.40 468.00
DRAFT COUNT I-RCRA VIOLATIONS AND COUNT II-CLEAN WATER ACT VIOLATIONS OF COMPLAINT.

09-30-85 MJC 9.00 360.00
REVIEW SCIENTIFIC STUDIES PERFORMED ON BURLINGTON LANDFILL; REVISE LIST OF "TOXIC POLLUTANTS" IN LEACHATE GENERATED BY BURLINGTON LANDFILL; REVIEW FEDERAL REGULATIONS FOR VIOLATIONS BY CITY REGARDING LANDFILL MANAGEMENT; ASSIST IN DRAFTING FACTUAL ALLEGATIONS OF COMPLAINT; CONFERENCE WITH ATTORNEY PEARSON

REGARDING OVERALL DIRECTION OF LAWSUIT.

10-01-85 RNB 10.40 468.00
DRAFT COUNTS III – VII OF THE COMPLAINT AND REVISE SAME.

10-01-85 MJC 6.00 240.00
TELEPHONE CONFERENCE WITH TOM MOREAU OF BURLINGTON WATER DEPARTMENT REGARDING APPOINTMENT TO REVIEW LANDFILL FILES AT WATER DEPARTMENT; CONFERENCE WITH TOM MOREAU; REVIEW OF WATER DEPARTMENT FILE.

10-02-85 RNB 11.10 499.50
REVISE COMPLAINT; CONFERENCE WITH ATTORNEY PEARSON TO ANALYZE RCRA AND CWA PROVISIONS AND REGULATIONS.

10-02-85 MJC 7.80 312.00
ASSIST IN DRAFTING COMPLAINT; REVIEW OF FEDERAL REGULATIONS AND STATUTES AND APPLICATION OF FACTS TO LAW; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

10-03-85 RNB 8.60 387.00
DRAFT FURTHER REVISIONS TO COMPLAINT.

10-03-85 MJC 4.00 160.00
COMPILE SUPPORTING DOCUMENTATION FOR FACTUAL ALLEGATIONS COMPLAINT; REVIEW FEDERAL AND STATE REGULATIONS AND STATUTES.

10-06-85 RNB 4.30 193.50
CONTINUE TO REVISE COMPLAINT, INCLUDING SECTIONS ON PLAINTIFFS'

INJURIES AND COUNT VIII ON UNCOMPENSATED TAKING; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

10-07-85 RNB 7.50 337.50
IDENTIFY AND ANALYZE CLEAN WATER ACT STANDARDS FOR PLAINTIFFS' MEMORANDUM FOR PRELIMINARY INJUNCTION; REVIEW SUPPORTING MEMORANDUM FOR PRELIMINARY INJUNCTION; REVISE SECTIONS OF COMPLAINT, CONFERENCE WITH ATTORNEY PEARSON REGARDING COMPLAINT AND SUPPORTING MEMORANDUM FOR PRELIMINARY INJUNCTION.

10-07-85 MJC 3.50 140.00
REVISE EXHIBIT A TO COMPLAINT; REVIEW ASSURANCES OF DISCONTINUANCE TO DOCUMENT VIOLATIONS BY CITY; TELEPHONE CONFERENCE WITH CLIENTS REGARDING FILING OF LAWSUIT.

10-08-85 RNB 8.50 382.50
REVIEW COMPLAINT WITH ERNEST DAGUE, SR. AND ERNEST DAGUE, JR.; REVISE SECTIONS OF PLAINTIFFS' MEMORANDUM IN SUPPORT OF A PRELIMINARY INJUNCTION; PROOFREAD COMPLAINT.

10-08-85 MJC 5.20 208.00
CONFERENCE WITH ATTORNEY BLAND REGARDING PLAN FOR COMPLETION OF COMPLAINT AND ASSOCIATED DOCUMENTS; TELEPHONE CONFERENCE WITH EPA AND U.S. ATTORNEY GENERAL'S OFFICE IN WASHINGTON, D.C. REGARDING SERVICE OF PROCESS REQUIRED BY FEDERAL STATUTE; TELEPHONE CONFERENCE

WITH CONSERVATION LAW FOUNDATION REGARDING SAME AND THEORIES APPLICABLE TO DAGUE CASE; PREPARATION FOR FILING OF COMPLAINT.

10/09/85 MJC 4.50 180.00
FILE COMPLAINT AND DELIVER TO ATTORNEYS BAILEY AND MCNEIL; TELEPHONE CONFERENCE WITH ATTORNEY MCNEIL TO VERIFY ACCEPTANCE OF SERVICE; DRAFT LETTER REGARDING SERVICE BY MAIL TO EPA AND U.S. ATTORNEY GENERAL; ORGANIZE FILE IN PREPARATION FOR FURTHER WORK ON CASE.

10/10/85 RNB 0.90 40.50
PREPARATION FOR PRELIMINARY INJUNCTION HEARING.

10/11/85 RNB 6.20 279.00
LEGAL RESEARCH ON "POINT SOURCES" UNDER THE CLEAN WATER ACT; LEGAL RESEARCH ON "SUBSTANTIAL AND IMMINENT ENDANGERMENT" STANDARD IN ENVIRONMENTAL STATUTES; LEGAL RESEARCH ON WETLAND PROTECTION; CONFERENCE WITH ATTORNEY PEARSON REGARDING FURTHER ANALYSIS OF POSSIBLE DEFENSES UNDER RCRA AND CWA.

10/11/85 MJC 2.50 100.00
PREPARATION FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION.

10/14/85 WWP 3.50 297.50
INTERVIEW MR. BISSETTE [sic]; DRAFT RETAINER AGREEMENT; READ NOTIFICATION REGULATIONS; IDENTIFY EXPERTS FOR AFFIDAVITS; REVIEW COMPLAINT FOR FACTUAL BASIS.

10/14/85 RNB 7.20 324.00
LEGAL RESEARCH ON CASELAW AND COMMENTARY UNDER RCRA AND CWA; INTERVIEW WITH DONALD R. BESSETTE REGARDING HIS MOTHER JOINING LAWSUIT; CONFERENCE WITH ATTORNEY PEARSON REGARDING NEED FOR METHANE GAS EXPERT AND EXPERT ON ENDANGERMENT PRESENTED BY LANDFILL.

10/14/85 MJC 5.30 212.00
PREPARE PACKAGE OF INFORMATIONAL MATERIALS FOR POTENTIAL EXPERTS; ARRANGE FOR COPYING OF SAME; REVIEW ALDERMEN'S AGENDA FOR POSSIBLE PUBLIC MEETING ON LANDFILL LAWSUIT; CONFERENCE ATTORNEY PEARSON IN PREPARATION FOR PRELIMINARY INJUNCTION HEARING; DRAFT INDEX TO EXPERT MATERIALS; CONFERENCE WITH MR. BESSETTE REGARDING NUISANCE AND METHANE GAS CLAIMS AND POSSIBILITY OF HIS MOTHER JOINING LAWSUIT AS PLAINTIFF.

10/15/85 WWP 4.20 357.00
TELEPHONE CONFERENCE WITH DR. FIRESTONE, DR. REED, AND DR. ROEBUCK; REVIEW TOXICOLOGY MATERIAL; REVIEW FEDERAL RCRA REGULATIONS ON OPEN DUMPING.

10/15/85 RNB 6.20 279.00
LEGAL RESEARCH OF CASELAW AND LEGISLATIVE HISTORY OF RCRA AND CWA FOR PRELIMINARY INJUNCTION HEARING; TELEPHONE CONFERENCE WITH THOMAS MARTIN OF EPA, REGION V. REGARDING EXPERT TO LOOK AT DATA AND TESTIFY AS

TO HAZARD PRESENTED TO PUBLIC HEALTH AND THE ENVIRONMENT; FURTHER PREPARATION FOR HEARING.

10/15/85 MJC 0.80 32.00
REVIEW PHOTOS OF LANDFILL SITE AND FILE; CONFERENCE WITH ATTORNEY PEARSON REGARDING ORGANIZATION OF FILE IN PREPARATION FOR HEARING AND FURTHER INVESTIGATION IN PREPARATION FOR HEARING.

10/15/85 WWB 0.50 15.00
LEGAL RESEARCH OF CASES AND LEGISLATIVE HISTORY UNDER RCRA AND CWA.

10/16/85 WWP 1.50 127.50
TELEPHONE CONFERENCE WITH POTENTIAL EXPERTS, DRS. FIRESTONE AND REED; REVIEW LISTS OF HAZARDOUS WASTES.

10/16/85 RNB 3.70 166.50
LEGAL RESEARCH ON REQUIREMENT OF SECURITY FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION; ANALYZE INVESTIGATIVE FINDINGS AT BESSETTE RESIDENCE; LEGAL RESEARCH OF LEGISLATIVE HISTORIES OF "HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984" AND "SOLID WASTE DISPOSAL ACT."

10/16/85 MJC 4.00 160.00
INTERVIEW DON AND ROSE BESSETTE AT MRS. BESSETTE'S HOME; INVESTIGATION OF METHANE GAS MIGRATION THERE; COMPILE AND SEND EXPERT MATERIALS TO EXPERTS.

10/17/85 RNB 4.20 189.00
TELEPHONE CONFERENCE WITH DR. ROEBUCK OF DARTMOUGH [sic] MEDICAL

SCHOOL REGARDING REVIEW OF DATA TO TESTIFY TO DETERMINE THAT LANDFILL MAY PRESENT A SUBSTANTIAL AND IMMINENT HAZARD TO THE PUBLIC HEALTH OR THE ENVIRONMENT; FURTHER RESEARCH OF CASELAW UNDER RCRA AND CWA.

10/18/85 WWP 5.50 467.50
REVIEW FACT DOCUMENTS AND AMENDED PLEADINGS.

10/18/85 RNB 6.30 283.50
LEGAL RESEARCH ON LEGISLATIVE HISTORIES OF RCRA AND CWA; DRAFT MOTION AND ORDER TO ADD A PARTY PLAINTIFF AND FILE AN AMENDED COMPLAINT; DRAFT AMENDED COMPLAINT; CONFERENCE WITH ATTORNEY PEARSON REGARDING MEETING WITH JULIE HACKBARDTH [sic].

10/18/85 MJC 1.00 40.00
CONFERENCE WITH DON BESSETTE AND LOUIS BESSETTE.

10/18/85 GLH 2.50 87.50
INTERVIEWS OF PROPERTY OWNERS ADJACANT TO THE CITY LANDFILL.

10/21/85 WWP 5.50 467.50
CONFERENCE WITH CLIENTS; DRAFT AFFIDAVITS; RESEARCH OPEN DUMPING REGULATIONS UNDER RCRA AND COMPARE WITH AVAILABLE EVIDENCE.

10/21/85 RNB 2.40 108.00
PREPARE FOR CONFERENCE WITH DAGUES ABOUT STATUS OF CASE AND ADDING ROSE A. BESSETTE AS A PARTY PLAINTIFF; LEGAL RESEARCH ON REGULATION OF METHANE GAS UNDER RCRA; LEGAL

RESEARCH ON GROUNDWATER PROTECTION UNDER RCRA.

10/21/85 MJC 2.20 88.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING ADDING ROSE BESSETTE AS PARTY PLAINTIFF TO LAWSUIT; CONFERENCE WITH DAGUES REGARDING SAME.

10/22/85 WWP 5.50 467.50
READ AND RESPOND TO MOTION TO CONTINUE; TELEPHONE CONFERENCE WITH COURT; REVISE OPPOSING MEMORANDUM; LEGAL RESEARCH ON PRELIMINARY INJUNCTION GROUNDS.

10/22/85 RBL 2.50 150.00
PREPARATION FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION; LEGAL RESEARCH REGARDING MOTION TO JOIN AND MOTION TO AMEND COMPLAINT.

10/22/85 RNB 7.30 328.50
TELEPHONE CONFERENCE WITH DR. WILLIAM ROEBUCK OF DARTMOUTH MEDICAL SCHOOL REGARDING HIS REVIEW OF EXPERT MATERIALS; TELEPHONE CONFERENCE WITH PROFESSOR REED OF VERMONT LAW SCHOOL REGARDING HIS REVIEW OF THE EXPERT DATA; PREPARATION FOR PRELIMINARY INJUNCTION HEARING AND ANALYZE MOTION TO CONTINUE HEARING FOR PRELIMINARY INJUNCTION; DRAFT OPPOSING MEMORANDUM.

10/22/85 MJC 3.00 120.00
INTERVIEW WITH TIM LYMAN, SITE VIEWING AND PHOTOS.

10/23/85 WWP 5.50 467.50
WORK ON HERMANCE AFFIDAVIT; TWO TELEPHONE CONFERENCES WITH DR. HERMANCE; READ METHANE GAS REPORTS; REVIEW OTHER AFFIDAVITS; FURTHER RESEARCH ON PRELIMINARY INJUNCTION STANDARDS; DELIVER DOCUMENTS TO HERMANCE.

10/23/85 RBL 4.00 240.00
LEGAL RESEARCH IN RESPONSE TO MOTION TO CONTINUE HEARING FOR PRELIMINARY INJUNCTION; COMPREHENSIVE REVISION TO MEMORANDUM IN OPPOSITION; EDIT FINAL DRAFT OF MOTION TO JOIN AND AMEND COMPLAINT.

10/23/85 RNB 8.70 391.50
DRAFT AFFIDAVITS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; REVISE OF MEMORANDUM IN OPPOSITION TO MOTION TO CONTINUE HEARING; TELEPHONE CONFERENCE WITH CHRIS FASTIE, GRADUATE STUDENT OF DEPARTMENT OF BOTANY AT UVM REGARDING HIS AFFIDAVIT AND THE UVM HYDROGEOLOGIC STUDY.

10/23/85 MJC 4.20 168.00
TELEPHONE CONFERENCE WITH RUTH EINSTEIN AND JULIE HACKBARTH REGARDING TESTIMONY AT PRELIMINARY INJUNCTION HEARING; DRAFT DAGUE AFFIDAVIT AND TWO CASE AFFIDAVITS; ORGANIZE FILE IN PREPARATION FOR PRELIMINARY INJUNCTION HEARING; PREPARE INFORMATION PACKAGE FOR EXPERTS.

10/24/85 WWP 3.00 255.00
PREPARATION AND FILING OF AFFIDAVITS; TELEPHONE CONFERENCES WITH EXPERTS; TELEPHONE CONFERENCES WITH MS. SMITH; CONFERENCE WITH CLIENTS; PREPARE FOR HEARING.

10/24/85 RBL 3.00 180.00
DRAFT ADDITIONAL LANGUAGE TO SUPPLEMENT MEMORANDUM IN OPPOSITION TO MOTION TO CONTINUE; DRAFT MEMORANDUM ON PRELIMINARY INJUNCTION STANDARDS.

10/24/85 RNB 9.20 414.00
INTERVIEW DR. CLARKE HERMANCE, PROFESSOR OF MECHANICAL ENGINEERING AT UVM, REGARDING HIS REVIEW OF DOCUMENTS PERTAINING TO THE MIGRATION OF METHANE GAS FROM THE BURLINGTON LANDFILL; REVISE DR. HERMANCE'S AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; PREPARATION FOR HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; TELEPHONE CONFERENCE WITH DR. WILLIAM ROEBUCK, PROFESSOR OF TOXICOLOGY AT THE DARTMOUTH MEDICAL SCHOOL; TELEPHONE CONFERENCE WITH DR. FRANK REED AT THE VERMONT LAW SCHOOL.

10/24/85 MJC 8.60 344.00
PREPARATION FOR PRELIMINARY INJUNCTION HEARING; DRAFT AND REVISE CASE AFFIDAVITS AND ADD ATTACHMENTS; DRAFT AND REVISE DAGUE AFFIDAVIT AND ADD ATTACHMENTS; ORGANIZE FILE; CONFERENCE WITH ATTORNEY PEARSON

REGARDING EVIDENCE; ARRANGE EXECUTION OF AFFIDAVITS.

10/24/85 GLH 4.00 140.00
REVIEW AND ORGANIZE REPORTS FROM LOCAL, STATE AND FEDERAL GOVERNMENTS AND FROM GENERATORS; PREPARE SUPPORTING AFFIDAVITS WITH ATTACHMENTS AND FILE MOTION AND DOCUMENTS WITH THE U.S. DISTRICT COURT; CONFERENCE WITH MR. CHRIS FASTIE REGARDING HIS RESEARCH PROJECT AT THE BURLINGTON LANDFILL AND HIS AFFIDAVIT.

10/25/85 WWP 4.00 340.00
PREPARE FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION.

10/25/85 RNB 7.60 342.00
DRAFT AFFIDAVIT OF DR. FRANK REED; PREPARATION FOR HEARING ON PRELIMINARY INJUNCTION; TELEPHONE CONFERENCES WITH JULIE HACKBARDTH [sic] AND RUTH EINSTEIN REGARDING THEIR TESTIMONY AT PRELIMINARY INJUNCTION HEARING; INTERVIEW DR. FRANK REED, PROFESSOR OF ECOLOGY AT THE ENVIRONMENTAL LAW CENTER AT THE VERMONT LAW SCHOOL.

10/25/85 MJC 4.50 180.00
MEETING WITH CLIENTS TO SIGN AFFIDAVITS FOR PRELIMINARY INJUNCTION HEARING; INSPECT BESSETTE PROPERTY; TEST BASEMENT, YARD AND BANK HOLES FOR PRESENCE OF METHANE GAS.

10/25/85 GLH 1.00 35.00
SET UP CAMERA EQUIPMENT; CONFERENCE WITH DR. FRANK REED.

10/26/85 WWP 2.00 170.00
PREPARE FOR PRELIMINARY INJUNCTION HEARING.

10/26/85 RNB 2.20 99.00
FURTHER LEGAL RESEARCH ON NOTICE AND OTHER PROCEDURAL REQUIREMENTS FOR CITIZEN SUITS BROUGHT UNDER RCRA AND THE CLEAN WATER ACT.

10/26/85 MJC 1.00 40.00
INSPECT BURLINGTON LANDFILL SITE FOR POINT SOURCES OF LEACHATE MIGRATION; OBSERVE WILDLIFE IN INTERVALE.

10/27/85 WWP 12.00 1,020.00
PREPARATION FOR TOMORROW'S PRELIMINARY INJUNCTION HEARING.

10/27/85 RNB 11.20 504.00
PREPARATION FOR PRELIMINARY INJUCTION [SIC] HEARING; DRAFT JURISDICTIONAL BASES AND ARGUMENTS FOR EACH COUNT FOR TRIAL NOTEBOOK; TELEPHONE CONFERENCE WITH CHRIS FASTIE REGARDING HIS TESTIMONY AT HEARING.

10/27/85 MJC 10.50 420.00
PREPARATION FOR PRELIMINARY INJUNCTION HEARING; REVIEW EVIDENCE AND EXPERT OPINIONS; DRAFT SUBPOENAS FOR CITY EMPLOYEES; STATUS MEMORANDUM REGARDING CONTAMINATION FOUND IN LEACHATE WELLS; ORGANIZE FILE FOR USE IN HEARING; COPY EXHIBITS TO BE ENTERED IN EVIDENCE; SERVICE OF SUBPOENA ON MOREAU; ATTEMPTS TO SERVE SUBPOENA ON GOODKIND.

10/28/85 WWP 10.00 850.00
PREPARE FOR AND REPRESENT CLIENTS AT PRELIMINARY INJUNCTION HEARING IN FEDERAL COURT.

10/28/85 RNB 7.40 333.00
PREPARATION FOR AND ASSIST AT HEARING ON PRELIMINARY INJUNCTION.

10/28/85 MJC 7.50 300.00
PREPARATION FOR AND ATTENDANCE AT HEARING; SERVICE OF SUBPOENAS ON GOODKIND, OGDEN, EINSTEIN, AND HACKBARTH; CONFERENCE WITH EINSTEIN AND HACKBARTH REGARDING REGULATION OF LANDFILL.

10/29/85 WWP 2.00 170.00
OUTLINE PEARSON AFFIDAVIT; TELEPHONE CONFERENCES WITH CLIENTS; PLAN DISCOVERY.

10/29/85 RNB 1.20 54.00
LEGAL RESEARCH ON CLEAN WATER ACT CASES INVOLVING DISCHARGES OF POLLUTANTS INTO A NAVIGABLE WATERWAY FROM A POINT SOURCE WITHOUT A NPDES PERMIT AND ON RCRA CASES INVOLVING ADMINISTRATIVE ACTION TO ABATE SUBSTANTIAL AND IMMINENT HAZARDS; PLAN DISCOVERY

10/30/85 WWP 2.00 170.00
OUTLINE INTERVIEW; TELEPHONE CONFERENCES WITH CLIENTS; TELEPHONE CONFERENCE WITH CITY ATTORNEY OFFICE; OUTLINE STRATEGY FOR HEARING ON NINTH.

10/30/85 RNB 3.40 153.00
ANALYZE AFFIDAVIT OF COMPLIANCE WITH NOTIFICATION REQUIREMENTS AND RESPONSE TO MOTION TO DISMISS; JOINT MEMORANDUM ON TESTIMONY GIVEN AT 10-28 HEARING; BEGIN DRAFTING MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS; REVIEW CASELAW ON NOTICE UNDER RCRA AND CWA; REVIEW FIRST PART OF PLAINTIFFS' INTERROGATORIES.

10/31/85 WWP 0.40 34.00
REVIEW INTERROGATORIES AND REQUESTS TO PRODUCE.

10/31/85 RNB 1.20 54.00
REVIEW AND REVISE INTERROGATORIES AND REQUESTS TO PRODUCE; REVISE MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS; TELEPHONE CONFERENCE WITH LIBRARIAN AT VERMONT LAW SCHOOL REGARDING NOTE ON CITIZEN SUITS.

10/31/85 MJC 10.50 420.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING FURTHER WORK IN PREPARATION FOR 12®10®85 COURT HEARING; ARRANGE FOR COPYING OF HEARING EXHIBITS; DRAFT ADDTIONAL [SIC] INTERROGATORIES AND REQUESTS TO PRODUCE; DRAFT MEMORANDUM REGARDING TESTIMONY HEARD ON 10®28®85 HEARING; REVISE INTERROGATORIES AND REQUESTS TO PRODUCE TO CITY; REVISE MEMORANDUM REGARDING WITNESS TESTIMONY AT 10®28®85 HEARING; ORGANIZE FILE FOR FUTURE USE.

11/01/85 WWP 2.40 204.00
REVIEW INTERROGATORIES AND REQUESTS TO PRODUCE; PLAN FURTHER INVESTIGATION AND DISCOVERY.

11/01/85 RNB 1.30 58.50
PLAN DEPOSITIONS OF DEFENDANT'S WITNESSES AND GENERATORS OF HAZARDOUS WASTES; REVIEW AND ANALYZE DOCUMENTS PERTAINING TO GENERATORS WHICH DISPOSED OF HAZARDOUS WASTES IN THE BURLINGTON LANDFILL.

11/01/85 MJC 0.80 32.00
REVIEW PHOTOS FOR USE AT CONTINUED PRELIMINARY INJUNCTION HEARING AND-OR TRIAL.

11/04/85 WWP 1.50 127.50
EDIT SUBPOENAS AND NOTICES OF DEPOSITION; TELEPHONE CONFERENCE WITH CLIENT; TELEPHONE CONFERENCE WITH CITY ATTORNEY OFFICE; REVIEW AND ANALYZE ANSWERS TO INTERROGATORIES AND REQUESTS TO PRODUCE.

11/04/85 RNB 1.00 45.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING SCHEDULING OF DEPOSITIONS; LEGAL RESEARCH ON "REASONABLE NOTICE" REQUIREMENT OF RULE 30(B)(1) OF THE F.R.CIV.P.; REVIEW SUBPOENAS.

11/04/85 MJC 3.00 120.00
PREPARE SUBPOENAS, NOTICES OF DEPOSITIONS, AND CERTIFICATE OF SERVICE FOR DEPOSITIONS OF HAZARDOUS WASTE GENERATORS® DISPOSERS; REVISE WITNESS AFFIDAVITS; REVISE TELEPHONE CONTACT LIST FOR FILE; TELEPHONE CONFERENCE

WITH ATTORNEY SHEAHAN REGARDING MALFUNCTION OF DAGUE GAS METER.

11/05/85 WWP 2.80 238.00
REVISE MOTION TO DISMISS; EDIT PLAINTIFFS' INTERROGATORIES AND REQUESTS TO PRODUCE; FURTHER REVIEW OF CITY'S RESPONSES TO DISCOVERY REQUESTS.

11/05/85 RNB 1.20 54.00
PLAN DISCOVERY; REVIEW WITNESS AFFIDAVITS, SUBPOENAS AND NOTICES OF DEPOSITIONS; REVIEW SUPPLEMENTAL NOTICE LETTER; REVIEW ATTORNEY PEARSON'S AFFIDAVIT; FURTHER ANALYSIS OF PLAINTIFFS' INTERROGATORIES AND REQUESTS TO PRODUCE AN MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS; ANALYZE BOARD OF ALDERMEN APPROPRIATION ON 11-4; REVIEW AND ANALYZE ANSWER.

11/05/85 MJC 8.30 332.00
REVIEW AND REVISE DEPOSITION SUBPOENAS TO HAZARDOUS WASTE GENERATORS; REVIEW AND REVISE NOTICES OF DEPOSITIONS; DRAFT ENCLOSURE LETTERS; ARRANGE FOR COPYING OF ATTACHMENTS TO DOCUMENTS TO BE FILED WITH COURT; ARRANGE FOR SERVICE OF SUBPOENAS; SERVE SUBPOENAS ON THREE GENERATORS; CONFERENCE WITH EACH GENERATOR REGARDING DEPOSITIONS TO BE TAKEN.

11/05/85 GLH 2.00 70.00
SERVE SUBPOENAS ON THE WHITING CO. AND HAGAR HARDWARE CO.

11/06/85 WWP 2.80 238.00
PLAN FURTHER INVESTIGATION AND DISCOVERY; REVIEW PLEADINGS; LETTER TO MESSRS. THOMAS, SANDERS AND WILSON.

11/06/85 RNB 13.30 598.50
DRAFT AND REVISE PLAINTIFFS' INTERROGATORIES AND REQUESTS TO PRODUCE; TELEPHONE CONFERENCE WITH MR. DILL OF E.B. & A.C. WHITING COMPANY REGARDING RESCHEDULING OF HIS DEPOSITION.

11/06/85 MJC 6.50 260.00
WORK ON INTERROGATORIES AND REQUESTS TO PRODUCE TO CITY BASED ON PLEADINGS AND EXTENSIVE REVIEW OF FACT RESEARCH IN FILE.

11/07/85 WWP 2.00 170.00
RESEARCH EPA ENFORCEMENT POLICY AND JOINT AND SEVERAL LIABILITY UNDER RCRA; OFFICE CONFERENCE ON INTERROGATORIES, DEPOSITIONS AND MOTIONS.

11/07/85 RNB 3.40 153.00
REVIEW NOTE ON CITIZEN SUITS; DRAFT ADDITIONAL REQUESTS TO PRODUCE; TELEPHONE CONFERENCE WITH ATTORNEY MIKE SHINE REGARDING SCHEDULING MR. DILL'S DEPOSITION; LEGAL RESEARCH ON EVASIVE RESPONSES TO COMPLAINT; TELEPHONE CONFERENCE WITH ATTORNEY BOB HEMLEY REGARDING RESCHEDULING DEPOSITION OF G.E. EMPLOYEE.

11/07/85 MJC 6.40 256.00
ORGANIZE FILE; REVISE INTERROGATORIES AND REQUESTS TO PRODUCE; FILE DISCOVERY DOCUMENTS WITH COURT AND OPPOSITE COUNSEL; TELEPHONE CONFERENCE WITH ATTORNEYS PEARSON AND BLAND REGARDING SERVICE OF DEPOSITION SUBPOENAS; REVISE TELEPHONE LIST TO INCLUDE GENERATORS' ATTORNEYS.

11/08/85 WWP 2.00 170.00
CONTINUE LEGAL RESEARCH ON ENFORCEMENT POLICY; TELEPHONE CONFERENCE WITH MR. HEMLEY; TELEPHONE CONFERENCE WITH MR. SHIEN'S OFFICE.

11/08/85 RBL 0.50 30.00
TELEPHONE CONFERENCE WITH MR. DAGUE REGARDING CITY EMPLOYEE'S VISIT AT HIS HOME TODAY WITHOUT ADVANCE NOTICE TO US OR TO MR. DAGUE.

11/08/85 MJC 6.10 244.00
DRAFT RESPONSES TO REQUESTS TO PRODUCE; EXTENSIVE REVIEW OF FILE FOR RESPONSIVE DOCUMENTS.

11/11/85 WWP 3.20 272.00
TELEPHONE CONFERENCE WITH MR. HEMLEY; PLAN DEPOSITIONS; TELEPHONE CONFERENCE WITH MR. PERRY'S OFFICE; ORGANIZE DEPOSITION EXHIBITS; TELEPHONE CONFERENCE WITH MR. SCHIEN; TELEPHONE CONFERENCE WITH MR. HILL; REVIEW GENERATOR RECORDS.

11/12/85 WWP 3.50 297.50
REVIEW AND EDIT ANSWERS TO INTERROGATORIES; TELEPHONE CONFERENCE WITH OPPOSING ATTORNEYS REGARDING

DEPOSITIONS; TELEPHONE CONFERENCE WITH CLIENT; TELEPHONE CONFERENCE WITH DEFENDANT; TELEPHONE CONFERENCE WITH MR. HEMLEY.

11/12/85 RNB 0.80 36.00
REVIEW PLAINTIFFS' RESPONSES TO INTERROGATORIES AND REQUESTS TO PRODUCE; TELEPHONE CONFERENCE WITH RUTH EINSTEIN REGARDING THE FACTS AND OPINIONS TO WHICH SHE IS EXPECTED TO TESTIFY AT HEARING ON 12-9-85; TELEPHONE CONFERENCE WITH THOMAS MARTIN OF EPA, REGION V, REGARDING EXPERTS.

11/13/85 WWP 5.50 467.50
PREPARE FOR AND TAKE DEPOSITIONS OF GOODKIND AND MOREAU; TELEPHONE CONFERENCES WITH CITY ATTORNEY; TELEPHONE CONFERENCES WITH CLIENT.

11/13/85 RNB 3.80 171.00
TELEPHONE CONFERENCE WITH DONALD BESSETTE REGARDING EXECUTION OF PLAINTIFFS' RESPONSES TO INTERROGATORIES AND REQUESTS TO PRODUCE; ATTEND DEPOSITIONS OF THOMAS MOREAU AND STEVEN GOODKIND.

11/13/85 MJC 6.50 260.00
REVIEW AND REVISE RESPONSES TO INTERROGATORIES AND REQUESTS TO PRODUCE; ARRANGE FOR COPYING OF ATTACHMENTS TO SAME; DELIVERY TO CLIENTS FOR SIGNATURES; CONFERENCE WITH CLIENTS REGARDING RESPONSES TO DISCOVERY REQUESTS.

11/14/85 WWP 4.50 382.50
PREPARE FOR AND DEPOSE JAMES ROBEAR OF BLODGETT CO.; TELEPHONE CONFERENCE WITH MR. HAGAR; PREPARATION FOR TOMORROW'S DEPOSITIONS; CONFERENCE WITH MR. CLAPP.

11/14/85 RNB 2.60 117.00
REVIEW STATUS OF CASE; PREPARATION FOR AND ATTEND DEPOSITION OF JAMES ROBEAR OF THE G.S. BLODGETT COMPANY, INC.

11/14/85 MJC 3.60 144.00
ORGANIZE FILE; DELIVERY OF RESPONSES TO INTERROGATORIES AND REQUESTS TO PRODUCE TO MR. BESSETTE FOR SIGNATURE; ASSIST IN PREPARATION FOR AND ATTEND DEPOSITION OF BLODGETT REPRESENTATIVE.

11/15/85 WWP 3.50 297.50
DEPOSE REPRESENTATIVE OF EDLUND CORP; CONFERENCE WITH MR. HAGAR; DEPOSITION OF REPRESENTATIVE OF WHITING CO; REVIEW HEMLEY LETTER; PREPARATION FOR DEPOSITIONS.

11/15/85 RNB 6.10 274.50
PREPARATION FOR DEPOSITIONS OF GENERATORS HAGAR HARDEWARE [SIC] AND PAINT, CO., THE EDLUND COMPANY, AND THE E.B. & A.C. WHITING CO.; ATTEND DEPOSITION OF LARRY BARTLETT OF THE EDLUND COMPANY; DEPOSE ROBERT DILL OF THE E.B. & A.C. WHITING CO.

11/15/85 MJC 2.50 100.00
PREPARATION FOR AND ATTEND DEPOSITIONS OF HAZARDOUS WASTE GENERATORS; TELEPHONE CONFERENCE WITH

ERNIE DAGUE, JR. REGARDING TRASH IN YARD, ARRANGEMENTS FOR INSTALLATION OF METER AND TESTING FOR GAS IN HOUSE; ORGANIZE DEPOSITION EXHIBITS.

11/18/85 WWP 1.00 85.00
PREPARATION FOR DEPOSITIONS OF G.E., DR. REED AND MR. PERRY; ARRANGE DISCOVERY SEQUENCE.

11/18/85 RNB 0.60 27.00
TELEPHONE CONFERENCE WITH DR. FRANK REED OF THE ENVIRONMENTAL LAW CENTER, VERMONT LAW SCHOOL, REGARDING SCHEDULING OF HIS DEPOSITION, TESTIMONY LIKELY TO BE ELICITED AT HIS DEPOSITION, AND INFORMATION NEEDED TO PREPARE FOR HIS DEPOSITION; TELEPHONE CONFERENCE WITH LEONARD PERRY, STATE OF VERMONT HORTICULTURALIST, REGARDING FACTS OF CASE AND HIS EXPERTISE AND HIS AVAILABILITY TO BE A WITNESS.

11/18/85 MJC 1.00 40.00
FURTHER INVESTIGATION REGARDING EDLUND CO. WASTE DISPOSAL; TELEPHONE CONFERENCE WITH JOHN GILLIGAN, FORMERLY OF EDLUND, REGARDING SAME; MEMORANDUM TO FILE REGARDING INTERVIEW WITH GILLIGAN.

11/19/85 WWP 0.30 25.50
REVIEW DEPOSITION SCHEDULE.

11/19/85 MJC 0.30 12.00
REVIEW INFORMATION TO BE SENT TO EXPERTS.

11/20/85 MJC 0.30 12.00
ANALYZE NEED FOR SITE VISIT BY LEONARD PERRY.

11/21/85 MJC 3.50 140.00
CIRCULATE COPIES OF DEPOSITION EXHIBITS TO OPPOSITE COUNSEL AND COUNSEL FOR DEPONENTS; LETTERS AND COPYING BILLS TO SAME; ORGANIZE FILE; TELEPHONE CONFERENCE WITH LEONARD PERRY REGARDING SITE INSPECTION; SEND EXPERT INFORMATION TO DR. REED.

11/22/85 WWP 1.00 85.00
REVIEW DEPOSITION SCHEDULE; PREPARATION FOR CONFERENCES WITH PROF. PERRY AND PROF. REED; TELEPHONE CONFERENCE WITH CLIENT.

11/25/85 WWP 2.80 238.00
PREPARE FOR TOMORROW'S DEPOSITION; TWO TELEPHONE CONFERENCES WITH MR. HEMLEY; THREE TELEPHONE CONFERENCES WITH COURT; OFFICE CONFERENCE ON PROTECTIVE ORDER.

11/25/85 RNB 1.00 45.00
TELEPHONE CONFERENCE WITH ATTORNEY BOB HEMLEY, COUNSEL FOR GENERAL ELECTRIC, REGARDING PROTECTIVE ORDER TO PREVENT DISCLOSURE OF TESTIMONY AND CONTENTS OF DOCUMENTS TO ANYONE OTHER THAN COUNSEL PRESENT AT DEPOSITION; CONFERENCE WITH DR. LEONARD PERRY REGARDING HIS INVESTIGATION OF LANDFILL SITE AND HIS CONCLUSIONS ON THE EFFECTS OF METHANE GAS ON TREES, SHRUBS AND VEGETATION; STATUS REVIEW OF CASE AND PLAN FURTHER INVESTIGATION AND DISCOVERY.

11/25/85 MJC 2.50 100.00
DISCUSS INTERROGATORIES WITH LEO PERRY, HORTICULTURAL EXPERT; VISIT LANDFILL; REVIEW DOCUMENTS WITH PERRY; ANALYZE PERRY'S OPINIONS.

11/26/85 WWP 8.00 680.00
REVIEW DOCUMENTS AND PROTECTIVE ORDER; PREPARATION FOR AND TAKE DEPOSITION OF G.E. REPRESENTATIVE; TWO TELEPHONE CONFERENCES WITH DR. REED.

11/26/85 RNB 6.70 301.50
PREPARATION FOR AND ATTEND DEPOSITION OF DONALD STEWART OF G.E.; TELEPHONE CONFERENCE WITH DR. FRANK REED OF VERMONT LAW SCHOOL REGARDING HIS DEPOSITION.

11/26/85 MJC 2.60 104.00
PREPARATION FOR DEPOSITION OF G.E. REPRESENTATIVE; ATTEND DEPOSITION WITH NOTES TO FILE; PREPARE DEPOSITION EXHIBITS.

11/27/85 WWP 3.50 297.50
PREPARE FOR AND ATTEND DEPOSITION OF PROF. REED; READ AND ANALYZE CITY'S ANSWERS TO INTERROGATORIES; PLAN RESPONSE AND OVERALL STRATEGY.

11/27/85 RNB 6.30 283.50
PREPARATION FOR AND ATTEND DEPOSITION OF DR. FRANK REED; REVIEW AND ANALYZE DEFENDANT'S RESPONSES TO PLAINTIFFS' INTERROGATORIES; PREPARATION FOR PRELIMINARY INJUNCTION HEARING.

11/27/85 MJC 1.20 48.00
PREPARATION FOR DEPOSITION OF DR. FRANK REED; PROVIDE DOCUMENTS TO DR. REED.

12/01/85 MJC 0.50 20.00
PREPARATION FOR 12-9-85 HEARING.

12/02/85 WWP 9.20 782.00
ANALYZE METHANE GAS PROBLEM; CONFERENCE WITH CLIENTS; TELEPHONE CONFERENCE WITH MS. SHEHAN; PREPARE FOR HEARING AND DEPOSITIONS; REVIEW MOREAU BOOKS; DEPOSITION OF MR. MOREAU; TELEPHONE CONFERENCE WITH CLIENT; TELEPHONE CONFERENCE WITH MR. MCNEIL; READ MOTION TO JOIN AND THIRD PARTY COMPLAINT.

12/02/85 RNB 8.50 382.50
PREPARATION FOR PRELIMINARY INJUNCTION HEARING; CONFERENCE WITH ERNIE AND BETTY DAGUE REGARDING GAS METER READINGS AND STATUS OF CASE; COMPILATION OF STATUTORY, REGULATORY AND LEGISLATIVE HISTORY MATERIALS ON OPEN DUMPING PROHIBITION OF RCRA; ORGANIZE GE DEPOSITION EXHIBITS; COMPILE NOTES OF DEPOSITION TESTIMONY; COMPILE AND ORGANIZE CASELAW.

12/02/85 MJC 6.20 248.00
PREPARATION FOR 12-9-85 HEARING; TRIP TO DAGUES TO OVERSEE GAS TESTING; TRIP TO BURLINGTON WATER DEPARTMENT FOR MOREAU LANDFILL RECORDS; PLAN FURTHER INVESTIGATION.

12/03/85 WWP 6.00 510.00
PREPARE FOR GOODKIND DEPOSITION; TAKE SAME; REVIEW GOODKIND DOCUMENTS.

12/03/85 RNB 9.20 414.00
PREPARATION FOR HEARING; DRAFT LIST OF HAZARDOUS WASTES DISPOSED OF IN BURLINGTON LANDFILL ACCORDING TO DEPOSITION EXHIBITS AND TESTIMONY; PREPARATION FOR AND ATTEND GOODKIND DEPOSITION; BEGIN DRAFTING PROPOSED FINDINGS OF FACT.

12/03/85 MJC 6.80 272.00
ORGANIZE WORK TO BE DONE; ATTEND GOODKIND DEPOSITION; TELEPHONE CONFERENCE WITH COURT REPORTERS; REVIEW FACTUAL BASIS OF LEGAL CLAIMS.

12/04/85 WWP 1.50 127.50
TELEPHONE CONFERENCES WITH DR. REED; ORGANIZE REED DOCUMENTS; REVIEW REED AFFIDAVIT; TELEPHONE CONFERENCE WITH CLIENT.

12/04/85 RNB 9.40 423.00
FINISH DRAFTING PROPOSED FINDINGS OF FACT (WITH SUPPORTING DOCUMENTS); DRAFT PROPOSED CONCLUSIONS OF LAW; REVIEW AND ANALYZE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

12/04/85 MJC 0.40 16.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING GAS READINGS IN HOUSE; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

12/05/85 WWP 7.50 637.50
REVIEW SCOPE OF REED DEPOSITION WITH DR. REED; PREPARE MOTION AND MEMORANDUM FOR SANCTIONS; PREPARE FOR MONDAY'S HEARING.

12/05/85 RNB 9.30 418.50
CONFERENCE WITH DR. FRANK REED IN PREPARATION FOR HIS DEPOSITION; ATTEND SAME; PREPARATION FOR HEARING.

12/05/85 MJC 4.50 180.00
ASSIST PREPARATION FOR DR. REED DEPOSITION; CONFERENCE WITH DR. REED REGARDING SAME.

12/06/85 WWP 8.00 680.00
REVIEW SIGNED INTERROGATORIES, MOTION FOR SANCTIONS; PREPARE FOR MONDAY'S HEARING; TELEPHONE CONFERENCES WITH ATTORNEY CLAPP; TELEPHONE CONFERENCE WITH DR. REED; OFFICE CONFERENCE WITH COURT REPORTER; OUTLINE FINDINGS OF FACT; REVIEW OGDEN DOCUMENTS.

12/06/85 RNB 8.30 373.50
EXTENSIVE PREPARATION FOR HEARING ON PRELIMINARY INJUNCTION.

12/06/85 MJC 3.00 120.00
REVIEW GOODKIND FILES; COPY NEW DOCUMENTS TO BE USED AT HEARING; CONFERENCE WITH ATTORNEY PEARSON REGARDING WORK TO BE DONE.

12-07-85 RNB 5.30 238.50
REVISE PROPOSED FINDINGS OF FACT; THOROUGH REVIEW OF DEPOSITION TRANSCRIPTS AND EXHIBITS.

12-08-85 WWP 13.00 1,105.00
PREPARATION FOR PRELIMINARY INJUNCTION HEARING

12-08-85 RNB 11.20 504.00
PREPARATION FOR HEARING ON PRELIMINARY INJUNCTION; DRAFT CHRONOLOGY AND REVISE PARTIAL PROPOSED FINDINGS OF FACT AND COMPILE DOCUMENTS THEREFOR; REVIEW ITEMS TO BE OFFERED INTO EVIDENCE AT THE HEARING.

12-08-85 MJC 13.00 520.00
PREPARATION FOR PRELIMINARY INJUNCTION HEARING; COPY EXHIBITS FOR PROPOSED FINDINGS OF FACT; ASSEMBLE PACKAGE OF DOCUMENTS FOR FILING WITH COURT; REVIEW AND ORGANIZE FILE.

12-09-85 WWP 11.70 994.50
PREPARE FOR AND ATTEND HEARING; PREPARE FOR AND TAKE COUNTRYMAN'S DEPOSITION.

12-09-85 RNB 11.70 526.50
PREPARATION FOR HEARING; ATTEND AND ASSIST AT SAME; PREPARATION FOR DEPOSITION OF WILLIAM COUNTRYMAN; ATTEND AND ASSIST AT SAME.

12-09-85 MJC 10.60 424.00
PREPARATION FOR AND ATTEND PRELIMINARY INJUNCTION HEARING; NOTETAKING; ANALYZE WITNESS TESTIMONY.

12-09-85 GLH 1.20 42.00
ASSIST IN TRANSPORTING AND DELIVERING FILES TO FEDERAL COURT FOR HEARING.

12-10-85 WWP 10.00 850.00
PREPARATION FOR AND TAKE DEPOSITION OF MR. HEINDEL.

12-10-85 RNB 8.40 378.00
TELEPHONE CONFERENCE WITH DON BESSETTE REGARDING STATUS OF CASE AND HIS ATTENDANCE AT HEARING FOR PRELIMINARY INJUNCTION; DRAFT ADDITIONAL PROPOSED FINDINGS OF FACT; OUTLINE DEPOSITION OF WILLIAM COUNTRYMAN AND TOPICS FOR CROSS EXAMINATION; PREPARATION FOR HEARING; ATTEND AND ASSIST AT HEARING.

12-10-85 MJC 9.30 372.00
PREPARATION FOR AND ATTEND PRELIMINARY INJUNCTION HEARING; CONFERENCE WITH DR. FRANK REED AND ERNIE DAGUE, JR. REGARDING WITNESS TESTIMONY; DRAFT STIPULATED DAGUE GAS TEST RESULTS; EDIT PROPOSED FINDINGS OF FACT; LIST NEW GOODKIND®MOREAU EXHIBITS; OUTLINE AREAS OF EXAMINATION; LIST CHEMICALS FOUND IN WATER; LIST ATTACHMENTS TO FINDINGS; REVIEW GOODKIND®OGDEN FILES AND COPY DOCUMENTS FROM SAME.

12-11-85 WWP 9.50 807.50
PREPARATION FOR AND ATTEND PRELIMINARY INJUNCTION HEARING; PREPARE FOR TOMORROW'S HEARING.

12-11-85 RBL 0.50 30.00
LEGAL RESEARCH REGARDING AUTHORITY OF MAGISTRATE.

12-11-85 RNB 5.20 234.00
REVIEW GOODKIND DEPOSITION EXHIBITS CONCERNING MIGRATION OF METHANE

FROM THE LANDFILL FOR USE AT THE HEARING; ATTEND SAME.

12-11-85 MJC 6.50 260.00
PREPARATION FOR PRELIMINARY INJUNCTION HEARING; ATTEND SAME AND TAKE NOTES.

12-12-85 WWP 9.00 765.00
PREPARATION FOR AND ATTEND HEARING; PREPARE FOR TOMORROW'S HEARING.

12-12-85 RNB 7.40 333.00
DRAFT PRELIMINARY STATEMENT AND FIRST ARGUMENT OF DISCUSSION IN SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; PREPARE FOR CROSS-EXAMINATION AND RE-DIRECT EXAMINATION OF DR. FRANK REED.

12-12-85 MJC 6.50 260.00
ATTENDANCE AND NOTETAKING AT PRELIMINARY INJUNCTION HEARING.

12-12-85 GLH 1.00 35.00
LEGAL RESEARCH REGARDING PROCEDURE FOR NOTICING DEPOSITIONS OF OUT-OF-STATE WITNESSES.

12-13-85 WWP 9.00 765.00
PREPARATION FOR AND ATTEND HEARING.

12-13-85 RNB 7.50 337.50
DRAFT PART OF SECOND ARGUMENT OF DISCUSSION IN SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; CONFERENCE WITH ATTORNEY PEARSON REGARDING TESTIMONY GIVEN AT HEARING.

12-13-85 MJC 6.50 260.00
ATTEND AND NOTETAKING AT PRELIMINARY INJUNCTION HEARING.

12-13-85 GLH 6.00 210.00
ASSIST IN TRANSPORTING FILES TO U.S. DISTRICT COURT FOR HEARING; TELEPHONE CONFERENCES WITH MR. DOWDELL, MR. CHAPPLE, MR. RATHE AND CONTACT VICON REGARDING CURRENT INTEREST IN ACCEPTING WASTE MATERIALS FROM THE CITY OF BURLINGTON, THE TIME NECESSARY TO ESTABLISH AND PUT INTO OPERATION A SYSTEM TO HANDLE THE WASTE MATERIALS AND THE WASTE MANAGEMENT PRACTICES OF THE BURLINGTON LANDFILL.

12-14-85 RNB 3.70 166.50
CONTINUE DRAFTING SECOND ARGUMENT OF DISCUSSION IN SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

12-15-85 WWP 11.00 935.00
PREPARATION FOR TOMORROW'S HEARINC; EDIT PROPOSED FINDINGS AND MEMORANDUM; PREPARATION FOR EXAMINATIONS OF COUNTRYMAN AND STATE OFFICIAL; TELEPHONE CONFERENCE WITH MR. LASH.

12-15-85 RNB 13.20 594.00
REVISE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

12-16-85 WWP 9.00 765.00
PREPARATION FOR AND ATTEND HEARING.

12-16-85 RNB 8.50 382.50
FINISH DRAFTING SECOND ARGUMENT AND DRAFT FOURTH ARGUMENT OF DISCUSSION IN SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING SAMPLES TAKEN OF LEACHATE TO DETERMINE NEED FOR PRETREATMENT AND EVALUATION BEING CONDUCTED ON ENVIRONMENTAL IMPACT OF LEACHATE COLLECTION SYSTEM ON WETLAND BY STATE WATER RESOURCES DEPARTMENT; PREPARATION FOR HEARING AND EXAMINATIONS OF STATE OFFICIAL AND COUNTRYMAN.

12-16-85 MJC 8.00 320.00
ATTEND AND NOTETAKING AT PRELIMINARY INJUNCTION HEARING.

12-17-85 WWP 5.60 476.00
ORGANIZE FILES FROM HEARING; OUTLINE MEMORANDUM, ADDITIONAL PROPOSED FINDINGS AND CONCERNS; TELEPHONE CONFERENCES WITH COURT; TELEPHONE CONFERENCE WITH MR. CLAPP.

12-17-85 RNB 6.10 274.50
LEGAL RESEARCH ON "SUBSTANTIAL AND IMMINENT" ENDANGERMENT STANDARD OF SECTION 6973 OF RCRA; DRAFT FIRST PART OF ARUGMENT [sic] III IN DISCUSSION SECTION OF SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

12-17-85 MJC 2.00 80.00
SITE INSPECTION OF BURLINGTON LANDFILL; REPORT TO ATTORNEY PEARSON

REGARDING SAME; TELEPHONE CONFERENCE WITH CARL PAGEL REGARDING PRETREATMENT OF LEACHATE; ORGANIZE WORK TO BE DONE; PLAN FURTHER INVESTIGATION.

12-18-85 WWP 7.50 637.50
EDIT FURTHER DRAFTS OF MEMORANDUM.

12-18-85 MJC 5.60 224.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COPY OF STATE LAWSUIT AGAINST CITY; REVIEW NEWS REPORTS REGARDING PRELIMINARY INJUNCTION HEARING; TELEPHONE CONFERENCE WITH FEDERAL COURT REGARDING TRANSCRIPT OF GOODKIND TESTIMONY FROM HEARING; REVIEW GOODKIND NOTES IN HIS FILE, LIST EXHIBITS TO HEARING AND DEPOSITIONS; TELEPHONE CONFERENCE WITH ATTORNEYS FOR HAZARDOUS WASTE GENERATORS REGARDING SIGNING OF DEPOSITION TRANSCRIPTS; TRIP TO FEDERAL COURT TO PICK UP TAPE OF GOODKIND TESTIMONY.

12-19-85 WWP 8.00 680.00
FINISH REVISING FIRST SECTION OF MEMORANDUM, PROPOSED FINDINGS AND CONCLUSIONS.

12-19-85 RNB 10.60 477.00
REVISE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; REVISE PROPOSED FINDINGS OF FACT.

12-19-85 MJC 7.10 284.00
ORGANIZE FILE; COPY EXHIBITS FOR FILING WITH COURT; INDEX EXHIBITS; PREPARATION FOR FILINGS OF PROPOSED FINDINGS AND CONCLUSIONS OF LAW.

12-19-85 GLH 1.30 45.50
OBTAIN MR. DILL'S SIGNATURE TO DEPOSITION; PICK UP CASSETTE TAPE WITH TESTIMONY AT U.S. DISTRICT COURT.

12-20-85 WWP 3.80 323.00
TOUR LANDFILL; FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

12-20-85 RNB 8.40 378.00
DRAFT THIRD ARGUMENT OF DISCUSSION IN SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION; REVIEW SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; DRAFT PROPOSED CONCLUSIONS OF LAW.

12-20-85 MJC 7.10 284.00
LANDFILL INSPECTION WITH ATTORNEY PEARSON, OPPOSING COUNSEL AND MAGISTRATE; PREPARATION FOR FILING PROPOSED FINDINGS AND CONCLUSIONS; ARRANGE FOR COPYING; ORGANIZE DOCUMENTS FOR FILING.

12-27-85 WWP 6.50 552.50
TELEPHONE CONFERENCES WITH MR. CLAPP; TELEPHONE CONFERENCE WITH MR. FRANCO; PICK UP CITY'S COUNTERCLAIM; READ SAME; REVIEW CITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM; REVIEW

CASES CITED BY CITY; REVIEW GOODKIND AND OGDEN DOCUMENTS.

12-30-85 WWP 5.20 442.00
RESEARCH PART 257 OF RCRA REGULATIONS AS APPLICABILE [sic] TO CITY'S REPLY MEMORANDUM; DETAILED REVIEW AND ANALYSIS OF CITY'S MEMORANDUM.

12-31-85 WWP 2.80 238.00
TELEPHONE CONFERENCE WITH MR. OGDEN; TELEPHONE CONFERENCE WITH MR. GOODKIND; DELIVERY OF BOXES TO MR. CLAPP'S OFFICE; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE; TELEPHONE CONFERENCE WITH COURT.

01-02-86 WWP 4.80 408.00
OUTLINE REPLY BRIEF; UPDATE FILE SYSTEM; TELEPHONE CONFERENCE WITH COURT; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE; TELEPHONE CONFERENCE WITH MS. HACKBARTH; TELEPHONE CONFERENCE WITH MR. MALTER'S OFFICE.

01-02-86 RNB 8.30 373.50
REVIEW STATUS OF CASE IN PREPARATION FOR DRAFTING REPLY MEMORANDUM; BEGIN DRAFTING FIRST ARGUMENT OF REPLY MEMORANDUM.

01-02-86 MJC 5.80 232.00
ANALYZE ARGUMENTS OPPOSING DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION; ORGANIZE FILE.

01-03-86 WWP 4.00 340.00
TELEPHONE CONFERENCE WITH MS. HACKBARTH; TELEPHONE CONFERENCE

WITH MR. MALTER; TELEPHONE CONFERENCE WITH MS. WRIGHT; ANALYZE REPLY MEMORANDUM; RESEARCH CITY'S PRELIMINARY INJUNCTION AUTHORITY.

01-03-86 RNB 8.80 396.00
ANALYZE SECOND AND THIRD ARGUMENTS OF PLAINTIFFS' REPLY MEMORANDUM; DRAFT SECOND ARGUMENT AND BEGIN DRAFTING THIRD ARGUMENT OF PLAINTIFFS' REPLY MEMORANDUM.

01-03-86 MJC 1.00 40.00
ANALYZE STATE ACTION IN REVIEWING NEED FOR PRE-TREATMENT OF LEACHATE AND OBTAIN STATE RESEARCH ON LEACHATE QUALITY; TELEPHONE CONFERENCE WITH BILL AHEARN AND MEREDITH WRIGHT REGARDING SAME; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING TEST RESULTS AND HIS REQUEST FOR GAS TEST SCHEDULE.

01-04-86 MJC 1.20 48.00
REVIEW FILE AND TABULATE ALL GAS WELL TEST RESULTS FROM OUTSIDE DAGUE PROPERTY; MEMORANDUM REGARDING SAME; REVIEW WATER TEST FILE FOR GOUNDWATER CONTAMINANTS IN EXCESS OF 40 CFR SECTION 257, APPENDIX I CHEMICALS.

01-05-86 RNB 4.30 193.50
FINISH DRAFT OF THIRD ARGUMENT AND DRAFT FOURTH ARGUMENT OF PLAINTIFFS' REPLY MEMORANDUM.

01-06-86 WWP 6.00 510.00
DRAFT AND EDIT REPLY MEMORANDUM; ANALYZE CITY'S OBJECTIONS TO PROPOSED FACTS; TELEPHONE CONFERENCE

WITH MS. WRIGHT; TELEPHONE CONFERENCES WITH AEC; TELEPHONE CONFERENCE WITH COURT.

01-06-86 RNB 0.70 31.50
CONFERENCE WITH WILLIAM AHERN OF THE VERMONT AGENCY OF ENVIRONMENTAL CONSERVATION REGARDING HIS LETTER TO MR. CROMBIE AND TEST RESULTS ON LEACHATE.

01-06-86 MJC 4.80 192.00
SEND OUT BILLS FOR COPYING; ANALYZE PLAINTIFFS' RESPONSE TO DEFENDANT'S OBJECTIONS TO PROPOSED FACTS; REVIEW DEFENDANT'S REQUEST TO ADMIT; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING TIME-DATE OF FINAL HEARING; REVIEW DEFENDANT'S OBJECTIONS TO PROPOSED FACTS; DRAFT MEMORANDUM REBUTTING OBJECTIONS.

01-07-86 WWP 7.00 595.00
DRAFT AND EDIT REPLY MEMORANDUM; RESEARCH; FILE MEMORANDUM.

01-07-86 RNB 2.30 103.50
LEGAL RESEARCH ON U.S. V. RIVERSIDE BAYVIEW HOMES, INC. AND WEINBERGER V. ROMERO-BARCELO; REVIEW THIRD-PARTY COMPLAINT; REVIEW DEFENDANT'S OBJECTIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT, DEFENDANT'S REQUESTS TO ADMIT AND DEFENDANT'S PROPOSED CONCLUSIONS OF LAW; REVIEW AND ANALYZE PLAINTIFFS' REPLY MEMORANDUM.

01-07-86 MJC 3.20 128.00
REVIEW MOREAU AND GOODKIND DEPOSITIONS REGARDING GAS MIGRATION AND

SOURCE OF LEACHATE; REVIEW DRAFT MEMORANDUM IN OPPOSITION TO DEFENDANT'S OBJECTIONS TO PROPOSED FACTS; REVIEW WATER TEST RESULTS FOR APPENDIX I CHEMICALS; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING LATEST GAS READINGS ON CLIENTS' PROPERTY; REVIEW TAPE OF 3-18-85 ALDERMEN'S MEETING FOR REFERENCES TO LANDFILL.

01-08-86 WWP 1.00 85.00
ANALYZE LEGAL RESEARCH AND GAS INVESTIGATION FOR FRIDAY'S HEARING.

01-08-86 MJC 1.70 68.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING STATUS OF INVESTIGATION ON CURRENT EFFORTS BY CITY TO CONTROL LANDFILL GAS; DELIVER REPLY MEMORANDUM TO COURT AND ATTORNEY CLAPP; SITE VISIT TO CLIENTS' PROPERTY TO VIEW EFFECTS OF GAS CONTROL SYSTEM; ORGANIZE FILE.

01-09-86 WWP 3.00 255.00
PREPARATION FOR TOMORROW'S HEARING; REVIEW HEINDEL AND COUNTRYMAN DEPOSITION REPORTS.

01-09-86 MJC 4.30 172.00
TELEPHONE CONFERENCE WITH VT. GAS TO BORROW GAS METER; GET SAME FROM VGS; TEST GAS AT DAGUES AND BESSETTES; RETURN METER; REPORT TO ATTORNEY PEARSON REGARDING RESULTS OF GAS TESTS.

01-10-86 WWP 6.50 552.50
PREPARATION FOR AND ATTEND PRELIMINARY INJUNCTION HEARING.

01-10-86 RNB 8.00 360.00
DRAFT MEMORANDUM ON SYNOPSIS OF ARGUMENTS AND SUPPORTING CASELAW IN PREPARATION FOR HEARING FOR PRELIMINARY INJUNCTION; CONFERENCE WITH ATTORNEY PEARSON IN PREPARATION FOR HEARING; ATTEND HEARING.

01-10-86 MJC 4.30 172.00
SEARCH FILE FOR INFORMATION ON LANDFILL POINT SOURCES FOR ALLEGATIONS OF CLEAN WATER ACT VIOLATION; SITE VISIT TO BURLINGTON LANDFILL WITH PHOTOS OF NEW GAS VENTING SYSTEM; CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; ATTEND FINAL HEARING ON MOTION FOR PRELIMINARY INJUNCTION.

01-13-86 WWP 1.00 85.00
REORGANIZE MATERIALS FROM HEARING; REVIEW NEW HEARING EXHIBITS FILE.

01-13-86 MJC 1.20 48.00
FACT RESEARCH AT CITY HALL REGARDING ALDERMANIC RESOLUTION TO FUND LANDFILL CLEANUP; DRAFT LETTER TO COURT AND ATTORNEY CLAPP REGARDING FILING OF ORIGINAL HEARING EXHIBITS FROM JANUARY 10 HEARING.

01-20-86 MJC 0.60 24.00
DRAFT AND REVIEW OUTLINE OF FACTS PROPOSED AND NOT OBJECTED TO BY CITY.

01-27-86 WWP 1.80 153.00
REVIEW PROPOSED FACT COMPARISONS; REVIEW MOTION TO COMPEL.

01-31-86 WWP 0.50 42.50
REVIEW FINDINGS OF FACT; PLAN ADDITIONAL DISCOVERY.

01-31-86 MJC 1.80 72.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING TRESPASS ON HIS PROPERTY BY CITY.

02-03-86 WWP 0.60 51.00
PLAN FURTHER DISCOVERY; TELEPHONE CONFERENCE WITH COURT.

02-10-86 MJC 1.00 40.00
REVIEW STATUS OF CASE; ORGANIZE FILE.

02-11-86 RNB 0.40 18.00
TELEPHONE CONFERENCE WITH PETER SHELLEY OF THE CONSERVATION LAW FOUNDATION IN BOSTON, MASSACHUSETTS TO DISCUSS THE STATUS OF THE CASE.

02-21-86 WWP 1.00 85.00
TWO TELEPHONE CONFERENCES WITH ATTORNEY BLAND ABOUT MAGISTRATE'S DECISION.

02-21-86 RNB 3.30 148.50
THOROUGH REVIEW AND ANALYSIS OF MAGISTRATE'S REPORT AND RECOMMENDATION; PREPARATION FOR FILING OBJECTIONS THERETO; RESPOND TO MEDIA INQUIRIES REGARDING PLAINTIFFS' REACTION TO MAGISTRATE'S REPORT AND RECOMMENDATION; TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. TO CONVEY AND DISCUSS MAGISTRATE'S DECISION; OUTLINE GROUNDS FOR FILING OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION.

02-21-86 MJC 3.00 120.00
TELEPHONE CONFERENCE WITH COURT REGARDING DECISION BY MAGISTRATE;

REVIEW DECISION; TELEPHONE CONFERENCE WITH CLIENT REGARDING SAME.

02-22-86 WWP 0.50 42.50
TELEPHONE CONFERENCE WITH ATTORNEY BLAND ABOUT OBJECTIONS TO MAGISTRATE'S DECISION.

02-23-86 RNB 2.30 103.50
INITIAL DRAFT OF PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION.

02-24-86 WWP 1.50 127.50
REVIEW DECISION AND ANALYZE FINDINGS OF FACT.

02-24-86 RNB 0.60 27.00
CONFERENCE WITH ATTORNEY PEARSON TO DISCUSS MAGISTRATE'S REPORT AND RECOMMENDATION AND PLAINTIFFS' OBJECTIONS THERETO.

02-24-86 MJC 2.00 80.00
PLAN FURTHER WORK TO BE DONE IN CASE AND DIVISION OF LABOR.

02-25-86 WWP 1.50 127.50
ANALYZE FINDINGS OF FACT AND OUTLINE OBJECTIONS TO MAGISTRATE'S DECISION.

02-26-86 WWP 1.00 85.00
FURTHER REVIEW FINDINGS OF FACT COMPARISON.

02-27-86 WWP 1.50 127.50
DRAFT AND EDIT OUTLINE FOR OBJECTIONS TO MAGISTRATE'S DECISION.

02-27-86 RNB 8.30 373.50
ANALYZE PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION; LEGAL RESEARCH ON RCRA'S PREEMPTION OF STATE REGULATION OF HAZARDOUS WASTE AND RETENTION OF STATE AUTHORITY; INITIAL DRAFT OF FIRST ARGUMENT REGARDING THE LANDFILL DISPOSAL OF HAZARDOUS WASTES IN VIOLATION OF RCRA'S HAZARDOUS WASTE PERMIT AND NOTIFICATION REQUIREMENTS.

02-27-86 MJC 2.50 100.00
DRAFT INTERROGATORIES TO CITY.

02-28-86 WWP 1.00 85.00
SEVERAL TELEPHONE CONFERENCES WITH MR. BLAND ABOUT OBJECTIONS TO MAGISTRATE'S DECISION.

02-28-86 RNB 7.50 337.50
REVISE FIRST ARGUMENT IN PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION AND INITIAL DRAFT OF SECOND AND THIRD ARGUMENTS REGARDING THE LANDFILL ITSELF AS A POINT SOURCE AND THE MAGISTRATE'S ORDER AS INCOMMENSURATE WITH THE LANDFILL'S VIOLATIONS OF RCRA AND THE CWA; REVIEW PLAINTIFFS' SECOND SET OF INTERROGATORIES.

02-28-86 MJC 2.00 80.00
REVIEW AND REVISE INTERROGATORIES TO CITY; DRAFT REQUESTS TO PRODUCE.

03-01-86 WWP 4.50 382.50
ORGANIZE AND DRAFT OBJECTIONS TO MAGISTRATE'S RULING.

03-02-86 WWP 8.00 680.00
EDIT, DRAFT, AND RESEARCH OBJECTIONS TO MAGISTRATE'S DECISION; OUTLINE CHRONOLOGY AND SPECIFIC OBJECTIONS.

03-02-86 RNB 8.80 396.00
WORK ON INITIAL DRAFTS OF FOURTH AND FIFTH ARGUMENTS TO PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION REGARDING THE LANDFILL AS AN OPEN DUMP AND ENGAGING IN OPEN DUMPING PRACTICES IN VIOLATION OF RCRA'S PROHIBITION ON OPEN DUMPING AND THE SUBSTANTIAL AND IMMINENT ENDANGERMENT PRESENTED BY THE LANDFILL TO THE ENVIRONMENT; EDIT DRAFT OF PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION.

03-03-86 WWP 3.50 297.50
ANALYZE OBJECTIONS, EDIT FINAL DRAFT OF OBJECTIONS TO MAGISTRATE'S DECISION; REVIEW AND ANALYZE CHRONOLOGY.

03-03-86 GSC 0.50 30.00
ANALYZE PROPOSED ORDER; LOCATE MODEL CONSENT DECREE.

03-03-86 RNB 11.90 535.50
DRAFT ADDITIONAL RECOMMENDATATIONS [sic] TO BE INCLUDED IN THE PROPOSED COURT ORDER; EDIT PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION; EDIT PLAINTIFFS' OJBECTIONS [sic] TO MAGISTRATE'S FINDINGS OF FACT; ASSIST IN DRAFTING THE CHRONOLOGY OF OPERATIONS AND

REGULATIONS PERTAINING TO THE LANDFILL.

03-03-86 JHT 6.80 306.00
CONFERENCE WITH ATTORNEY BLAND REGARDING PREPARATION OF CHRONOLOGY BASED ON FINDINGS OF FACT OF MAGISTRATE; REVIEW FINDINGS AND DEVELOPMENT OF CHRONOLOGIC STRUCTURE; CREATE "TIME LINE" BASED ON THE FINDINGS OF FACT; DRAFT COMPUTER-ASSISTED GRAPHIC PRESENTATION; REVIEW AND ANALYSIS OF SAME.

03-03-86 MJC 7.00 280.00
ASSIST IN DRAFTING AND REVISING OBJECTIONS TO MAGISTRATE'S RECOMMENDATIONS; ASSIST IN PREPARATION AND FILING OF LEGAL AND FACTUAL ARGUMENTS REGARDING SAME; ASSIST IN DRAFTING TIME LINE OF EVENTS FROM MAGISTRATE'S FINDINGS; REVIEW SUPPORTING FILE DOCUMENTS.

03-04-86 WWP 2.50 212.50
READ AND ANALYZE CITY'S AND GE'S OBJECTIONS TO MAGISTRATE'S RULING; OBTAIN AND READ TEXAS CASE ON BINDING EFFECT OF MAGISTRATE'S OR JUDGE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW; REVIEW OUTLINE OF PROPOSED ORDER.

03-04-86 JHT 4.80 216.00
REVISE CHRONOLOGY BASED ON MAGISTRATE'S FINDINGS OF FACT; EXTENSIVE REVISIONS OF CHRONOLOGY TO DETAIL YEARS OF HAZARDOUS WASTES DUMPING BY GENERATORS; REVIEW FINAL VERSION OF CHRONOLOGY.

03-04-86 MJC 5.00 200.00
FURTHER WORK ON DRAFTING OBJECTIONS TO MAGISTRATE'S DECISION; PROOFREAD CHRONOLOGY FOR FILING WITH COURT; REVIEW OBJECTIONS TO MAGISTRATE'S RECOMMENDATIONS FILED BY G.E. AND CITY; DRAFT MEMORANDUM ANALYZING CITY'S OBJECTIONS.

03-05-86 WWP 2.20 187.00
REVISE PROPOSED ORDER.

03-05-86 RNB 5.80 261.00
THOROUGH REVIEW OF CITY'S AND THIRD-PARTY DEFENDANT GENERAL ELECTRIC COMPANY, INC.'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE; DRAFT PROPOSED ORDER FOR PRELIMINARY INJUNCTION.

03-05-86 MJC 1.50 60.00
REVISE MEMORANDUM REGARDING CITY'S OBJECTIONS TO MAGISTRATE'S RECOMMENDATIONS; RESEARCH OF GOODKIND'S TESTIMONY ON LANDFILL GAS GENERATION AND MIGRATION.

03-07-86 MJC 1.00 40.00
ORGANIZE FILE; REVIEW LATEST PLEADINGS.

03-09-86 WWP 0.40 34.00
READ HAGAR HARDWARE OBJECTIONS TO MAGISTRATE'S RULING.

03-10-86 WWP 0.60 51.00
TELEPHONE CONFERENCE WITH MS. SHEEHAN; REVIEW INTERROGATORIES.

03-10-86 MJC 3.00 120.00
PLAN FURTHER FACT INVESTIGATION AND PREPARATION FOR ARGUMENT OVER GAS

TESTIMONY; REVIEW FILE FOR WATER TEST RESULTS; TELEPHONE CONFERENCE WITH MEREDITH WRIGHT REGARDING LEACHATE COLLECTED; REVIEW NEW INTERROGATORIES AND REQUESTS TO PRODUCE; COMPARE TO PREVIOUSLY FILED SET FOR COMPLETENESS.

03-11-86 WWP 0.30 25.50
REVIEW ATTORNEY MORGAN'S OBJECTIONS TO MAGISTRATE'S REPORT.

03-11-86 MJC 0.50 20.00
TELEPHONE CONFERENCE WITH MEREDITH WRIGHT REGARDING STATUS OF STATE REVIEW OF LEACHATE COLLECTION; REVIEW INTERROGATORIES AND REQUESTS TO PRODUCE TO BE FILED.

03-12-86 MJC 1.20 48.00
REVISE INTERROGATORIES AND REQUESTS TO PRODUCE; ATTEMPTS TO CONTACT BRIAN QUAKER AT AEC.

03-13-86 WWP 0.30 25.50
TELEPHONE CONFERENCE WITH CLIENTS.

03-13-86 MJC 1.20 48.00
ORGANIZE FILE; TELEPHONE CONFERENCE WITH BRIAN QUAKER REGARDING STATUS OF LEACHATE PRE-TREATMENT REGULATION.

03-17-86 MJC 0.20 8.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING PHOTOGRAPHING OF CLIENTS' HOUSE.

03-24-86 WWP 0.50 42.50
REVIEW MOTION TO AMEND; TELEPHONE CONFERENCE WITH COURT; REVIEW INTERROGATORIES.

03-24-86 MJC 0.30 12.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING EXCESSIVE TRASH IN YARD FROM LANDFILL; PLAN FURTHER WORK TO BE DONE.

03-26-86 MJC 0.40 16.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING CURRENT GAS READINGS AND STATUS OF CITY'S RETURN OF GAS METER.

03-27-86 RNB 2.30 103.50
THOROUGH REVIEW AND ANALYSIS OF JUDGE BILLINGS' OPINION; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON TO DISCUSS JUDGE BILLINGS' OPINION AND GROUNDS FOR AN APPEAL THEREFROM; LEGAL RESEARCH ON PROCEDURES FOR THE WITHDRAWAL OF EPA AUTHORIZATION OF A STATE HAZARDOUS WASTE PROGRAM UNDER RCRA AND THE REGULATIONS PROMULGATED THEREUNDER; LEGAL RESEARCH ON RULES OF APPELATE [sic] PROCEDURE FOR APPEALING AN ORDER OF THE U.S. DISTRICT COURT.

03-27-86 MJC 0.60 24.00
INTRAOFFICE CONFERENCE REGARDING COURT'S DENIAL OF MOTION FOR PRELIMINARY INJUNCTION; REVIEW AND ANALYZE COURT ORDER.

03-31-86 MJC 1.00 40.00
SEARCH FOR LANDFILL LEACHATE EXPERT.

04-02-86 MJC 0.50 20.00
CONTINUE SEARCH FOR EXPERTS ON LANDFILL LEACHATE; PLAN FOR FURTHER EXPERT RESEARCH ON EFFECTS OF LANDFILL LEACHATE ON PLANTS.

04-04-86 WWP 1.50 127.50
REVIEW AND ANALYZE JUDGE BILLINGS' DECISION AND APPEAL OPTIONS.

04-04-86 RNB 2.40 108.00
FURTHER ANALYSIS OF JUDGE BILLINGS' OPINION AND ARGUMENTS TO BE MADE ON APPEAL; DRAFT OUTLINE OF HAZARDOUS WASTE PERMIT ARGUMENTS TO BE MADE ON APPEAL.

04-04-86 MJC 0.30 12.00
REVIEW NEWS REGARDING CITY'S SOLUTION TO FUNDING OF DUMP CLOSING; COPY SAME.

04-07-86 WWP 3.00 255.00
OUTLINE AND EVALUATE GROUNDS FOR APPEAL; TELEPHONE CONFERENCE WITH COURT.

04-07-86 MJC 1.50 60.00
REVIEW STATUS OF LEACHATE COLLECTION AND DISPOSAL; TELEPHONE CONFERENCE WITH ASSISTANT ATTORNEY GENERAL WRIGHT REGARDING RELEASE OF STATE DOCUMENTS ON LEACHATE; TELEPHONE CONFERENCE WITH AND LETTER TO WATER RESOURCES DEPARTMENT REGARDING SAME.

04-08-86 MJC 0.80 32.00
REVIEW AND REVISE INFORMATION REQUEST LETTER TO VAEC; REVIEW FILE IN PREPARATION FOR FURTHER FACT RESEARCH.

04-09-86 RNB 2.30 103.50
PLAN FURTHER DISCOVERY; REVIEW LEGISLATIVE HISTORY ON BILL TO PROTECT WETLANDS AND ON VERMONT'S GROUNDWATER PROTECTION LAW.

04-09-86 MJC 0.50 20.00
PLAN FURTHER INVESTIGATION AND DISCOVERY.

04-11-86 WWP 0.30 25.50
STATUS CONFERENCE.

04-11-86 RNB 0.40 18.00
REVIEW INFORMATION PROVIDED BY GARY SHULTZ OF THE VERMONT AEC, ON THE BURLINGTON LANDFILL LEACHATE.

04-15-86 RNB 1.30 58.50
FURTHER ANALYSIS OF STANDARDS FOR PRELIMINARY INJUNCTION, STANDARD OF REVIEW ON APPEAL, AND ARGUMENTS TO BE RAISED ON APPEAL.

04-15-86 MJC 2.00 80.00
REVIEW LEACHATE CHEMICAL RESEARCH FROM STATE; REVIEW FILE AND ACCOUNT FOR OUT-OF-POCKET EXPENSES; TELEPHONE CONFERENCE WITH FEDERAL COURT REGARDING COSTS OF HEARING TRANSCRIPTS; TELEPHONE CONFERENCE WITH ATTORNEY CAIN REGARDING SAME; MEMORANDUM REGARDING SAME.

04-16-86 MJC 1.30 52.00
REVIEW FILE AND DRAFT MEMORANDUM ON EXPENSES TO DATE.

04-17-86 MJC 0.50 20.00
REVIEW FILE FOR COPY OF LATEST DISCOVERY DOCUMENT SENT TO CITY OF BURLINGTON; TELEPHONE CONFERENCE WITH

FEDERAL COURT REGARDING DATE OF FILING.

04-18-86 RNB 2.80 126.00
LEGAL RESEARCH ON INJUNCTIVE RELIEF UPON A VIOLATION OF THE CLEAN WATER ACT.

04-21-86 RNB 1.60 72.00
ANALYZE ISSUES PROPOSED TO BE RAISED ON APPEAL AND THE PROCEDURE ON APPEAL; DRAFT NOTICE OF APPEAL.

04-22-86 WWP 2.00 170.00
OUTLINE AND ANALYZE APPEAL ISSUES; REVIEW EXHIBIT AND TRANSCRIPT REQUIREMENTS ON APPEAL.

04-22-86 RNB 1.20 54.00
FURTHER ANALYSIS OF ISSUES PROPOSED TO BE RAISED ON APPEAL; DRAFT PREARGUMENT STATEMENT.

04-22-86 MJC 0.40 16.00
TELEPHONE CONFERENCE WITH FEDERAL COURT FOR LIST OF EXHIBITS; REVIEW AND PROOFREAD NOTICE OF APPEAL DOCUMENTS.

04-23-86 WWP 2.00 170.00
LENGTHY REVIEW OF PROCEDURES FOR SECOND CIRCUIT COURT OF APPEALS.

04-23-86 MJC 0.30 12.00
REVIEW EXHIBIT LIST FROM FEDERAL COURT; MEMORANDUM TO ATTORNEY BLAND REGARDING SAME.

04-24-86 WWP 1.00 85.00
ANALYZE POSSIBLE MOTION FOR PARTIAL SUMMARY JUDGMENT.

04-24-86 RNB 0.80 36.00
ANALYZE PROCEDURE FOR DOCKETING THE APPEAL; TELEPHONE CONFERENCE WITH CLERK OF FEDERAL DISTRICT COURT.

04-24-86 MJC 0.40 16.00
PLAN FURTHER INVESTIGATION AND ESTIMATE TIME NEEDED TO COMPLETE FACT INVESTIGATION BEFORE TRIAL.

04-25-86 WWP 0.30 25.50
REVIEW CONSENT TO TRIAL BY MAGISTRATE.

04-28-86 RNB 0.50 22.50
REVIEW PROCEDURE FOR ADMISSION TO PRACTICE BEFORE THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT.

04-29-86 WWP 0.30 25.50
REVIEW LETTER FROM MS. SHEEHAN REGARDING GAS DETECTOR.

04-29-86 RNB 1.30 58.50
FURTHER ANALYSIS OF PROCEDURE ON APPEAL; DRAFT OUTLINE OF PROCEDURE AND DEADLINES ON APPEAL.

04-30-86 WWP 1.00 85.00
FINAL REVIEW OF FORMS C AND D, OTHER APPEAL PROCEDURES AND PROPER CERTIFICATION.

04-30-86 RNB 1.50 67.50
ANALYZE NEED TO FILE DEPOSITIONS OF THE GENERATORS SO AS TO INCLUDE THEM WITHIN THE DOCKET ENTRIES; REVIEW AND ANALYZE FORMS C AND D AND FURTHER LEGAL RESEARCH ON PROCEDURES ON APPEAL.

04-30-86 MJC 0.60 24.00
SUBMITTAL OF DEPOSITIONS TO FEDERAL COURT FOR FILING; TELEPHONE CONFERENCE WITH COURT CLERK REGARDING SAME.

05-01-86 WWP 0.60 51.00
FINAL APPROVAL OF APPEAL FORMS; SERVICE OF SAME.

05-01-86 RNB 0.50 22.50
REVIEW OF PAPERS TO BE FILED IN THE COURT OF APPEALS AND IN THE U.S. DISTRICT COURT, AND TO BE SERVED ON THE OTHER PARTIES.

05-04-86 MJC 0.30 12.00
LETTER TO COURT CLERK REGARDING FILING OF DEPOSITIONS.

05-05-86 RNB 2.80 126.00
LEGAL RESEARCH UNDER RCRA AND THE CWA IN PREPARATION FOR DRAFTING APPELLANTS' BRIEF.

05-06-86 WWP 1.00 85.00
READ SECOND CIRCUIT SCHEDULING CALENDAR; CONFERENCE WITH MR. CLAPP; TELEPHONE CONFERENCE WITH CLIENT.

05-06-86 RNB 5.20 234.00
CONTINUE LEGAL RESEARCH UNDER RCRA AND THE CWA IN PREPARATION FOR DRAFTING BRIEF.

05-07-86 WWP 1.00 85.00
REVIEW APPEAL SCHEDULE OF HEARING DATES AND ISSUES OUTLINE; REVIEW EVIDENCE OF TRASH AT DAGUE HOUSE; REVIEW PHOTOGRAPHS.

05-07-86 RNB 7.30 328.50
DRAFT LETTERS TO MR. BURBANK AND ATTORNEY CLAPP REGARDING CONSENT TO PROCEED BEFORE THE MAGISTRATE; TELEPHONE CONFERENCE WITH CLERK OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT REGARDING ADMISSION TO PRACTICE BEFORE THE SECOND CIRCUIT; CONTINUE LEGAL RESEARCH OF CASELAW UNDER RCRA AND THE CWA IN PREPARATION FOR DRAFTING THE BRIEF.

05-08-86 WWP 0.50 42.50
REVIEW EXHIBIT REQUIREMENTS.

05-08-86 RNB 5.80 261.00
DRAFT FIRST PART OF ARGUMENT I OF APPELLANTS' BRIEF.

05-08-86 MJC 0.60 24.00
LETTER TO MS. SHEAHAN REGARDING REMOVAL OF GAS EQUIPMENT; EVALUATE TRASH PROBLEM AT LANDFILL.

05-09-86 WWP 2.30 195.50
REVIEW OUTLINE FOR BRIEF; LETTER TO MR. CLAPP REGARDING EXHIBITS.

05-09-86 RNB 6.30 283.50
DRAFT SECOND AND THIRD PARTS OF ARGUMENT I OF APPELLANTS' BRIEF.

05-09-86 MJC 2.00 80.00
REVIEW EXHIBITS TO BE FILED WITH APPEALS COURT; DELIVER NOTICE OF EXHIBITS DESIGNATED TO ATTORNEY CLAPP.

05-11-86 RNB 3.30 148.50
DRAFT ARGUMENT II OF APPELLANTS' BRIEF.

05-12-86 RNB 5.50 247.50
THOROUGH ANALYSIS OF WEINBERGER CASE AND DRAFT ARGUMENT III OF THE BRIEF.

05-13-86 WWP 4.50 382.50
PREPARE FOR TOMORROW'S PRE-ARGUMENT CONFERENCE.

05-13-86 RNB 5.20 234.00
DRAFT STATEMENT OF THE CASE AND STATEMENT OF THE FACTS; REVISE ARGUMENTS I, II, AND III; PREPARATION FOR PRE-ARGUMENT CONFERENCE.

05-14-86 WWP 9.00 765.00
PREPARATION FOR AND ATTEND CONFERENCE AT SECOND CIRCUIT COURT OF APPEALS.

05-14-86 RNB 11.00 495.00
PREPARATION FOR AND ATTEND PRE-ARGUMENT CONFERENCE AT THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT.

05-15-86 WWP 0.30 25.50
LETTER TO COURT.

05-15-86 RNB 0.30 13.50
TELEPHONE CONFERENCE WITH CLERK OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT REGARDING SCHEDULING OF ARGUMENT.

05-16-86 WWP 1.00 85.00
REVIEW DOCKET ENTRIES; TELEPHONE CONFERENCE WITH MR. CLAPP; LETTER TO COURT.

05-16-86 RNB 1.50 67.50
EXTENDED TELEPHONE CONFERENCE WITH JOEL BLUMSTEIN, ATTORNEY FOR

EPA REGION I, RCRA HAZARDOUS WASTE DIVISION; EXTENDED TELEPHONE CONFERENCE WITH BRUCE LINNETT, ATTORNEY FOR ENVIRONMENTAL DEFENSE FUND, INC.

05-16-86 MJC 0.70 28.00
ANALYZE EXHIBITS TO BE DESIGNATED ON APPEAL; DELIVER NOTICE OF SAME TO OPPOSITE COUNSEL.

05-19-86 RNB 2.80 126.00
COMPILE APPENDIX AND TABLE OF CONTENTS OF BRIEF.

05-20-86 WWP 5.20 442.00
DRAFT AND EDIT BRIEF; DETAILED ANALYSIS OF NECESSARY REVISIONS TO SAME.

05-20-86 RNB 4.50 202.50
TELEPHONE CONFERENCE WITH MR. JARVIS REGARDING DEPOSITIONS OF THRID-PARTY DEFENDANTS AND PLAINTIFFS' EXHIBITS; ANALYZE ISSUES IN NEED OF ADDITIONAL LEGAL RESEARCH AND ANALYZE ISSUES RAISED ON APPEAL; ANALYSIS OF CITY OF GALLATIN CASE AND THE "HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984."

05-21-86 WWP 6.50 552.50
DRAFT AND EDIT BRIEF.

05-21-86 RNB 10.80 486.00
FURTHER ANALYSIS OF ISSUES RAISED ON APPEAL; REVIEW PROCEDURAL REQUIREMENTS FOR BRIEF; REVISE BRIEF.

05-21-86 MJC 2.80 112.00
SEND JUDGE BILLING'S OPINION TO DR.REED; ASSEMBLE DOCUMENTS FOR APPENDIX TO APPELLANTS' BRIEF.

05-22-86 WWP 5.00 425.00
FURTHER EDITS TO BRIEF; FURTHER ANALYSIS OF WASTE INDUSTRIES AND OTHER IMPORTANT CASES; REVIEW CASE CHART.

05-22-86 RNB 8.30 373.50
DRAFT CHART OF CASELAW FOR THE APPEAL; DRAFT CHECKLIST FOR THE APPEAL; REVISE BRIEF.

05-22-86 MJC 4.00 160.00
ASSEMBLE AND PAGINATE APPENDIX TO APPELLANTS' BRIEF; REVIEW CITATIONS IN BRIEF FOR APPENDIX.

05-23-86 WWP 7.50 637.50
EXTENSIVE EDIT OF BRIEF; REVIEW FILING FORM REQUIREMENTS.

05-23-86 RNB 7.30 328.50
FURTHER ANALYSIS AND REVISE BRIEF; DRAFT CERTIFICATE OF SERVICE.

05-23-86 JHT 2.20 99.00
LEGAL RESEARCH REGARDING SCOPE OF DISCRETION FOR INJUNCTIVE RELIEF.

05-23-86 MJC 5.00 200.00
PREPARATION FOR APPEAL; FILE ORGANIZATION; SITE INSPECTION AND CONFERENCE WITH CLIENTS REGARDING CITY'S REQUEST TO CLEAN BANK BESIDE LANDFILL; ASSIST IN PREPARING DOCUMENTS FOR APPEAL.

05-25-86 WWP 4.50 382.50
DRAFTING AND EDITING BRIEF.

05-26-86 WWP 10.00 850.00
EXTENSIVE DRAFTING AND EDITING OF BRIEF; ANALYZE JUDICIAL DISCRETION AND LEGAL RESEARCH ON SAME.

05-26-86 MJC 7.70 308.00
PREPARATION FOR FILING BRIEF, APPENDIX AND ADDENDUM WITH COURT OF APPEALS; PROOFREAD BRIEF; COPY STATUTES FOR ADDENDUM.

05-26-86 DL 7.00 210.00
LEGAL RESEARCH ON STANDARDS FOR ISSUANCE OF PRELIMINARY INJUNCTION UPON VIOLATION OF FEDERAL ENVIRONMENTAL AND OTHER PUBLIC INTEREST LEGISLATION.

05-27-86 WWP 2.50 212.50
PREPARE BRIEF FOR FILING WITH COURT OF APPEALS.

05-27-86 MJC 6.80 272.00
PREPARE BRIEF, APPENDIX AND ADDENDUM FOR FILING; TELEPHONE CONFERENCE WITH PRINTERS REGARDING SAME; ORGANIZE AND COMPLETE PRINTING, PROOFREAD AND REVISE BRIEF; ASSEMBLE PACKAGES OF DOCUMENTS FOR FILING AND SERVICE; TELEPHONE CONFERENCE WITH DON BESSETTE REGARDING CITY'S REQUEST TO CLEAR BANK; MEMORANDUM REGARDING SAME.

05-28-86 WWP 0.50 42.50
READ HAGAR'S MOTION TO APPEAR; REVIEW CITY TRASH CLEAN-UP LETTER.

05-28-86 MJC 4.90 196.00
TELEPHONE CONFERENCE WITH PRINTER TO STRAIGHTEN OUT PRINTING BILL; ORGANIZE FILE FOR USE IN PREPARATION FOR APPEAL AND TRIAL.

05-29-86 WWP 2.50 212.50
READ G.E. MOTION TO DISMISS; PLAN FURTHER INVESTIGATION; VISIT TO LANDFILL.

05-29-86 MJC 0.40 16.00
FILE ORGANIZATION.

06-02-86 MJC 0.60 24.00
REVIEW GE MOTION TO DISMISS; ORGANIZE FILE.

06-03-86 WWP 2.80 238.00
REVIEW CITY'S LETTER FOR BANK CLEAN-UP; REVIEW AND ANALYZE BRIEF WITH ATTORNEY BLAND; OUTLINE NOTICE ARGUMENTS; REVIEW G.E. MOTION.

06-03-86 RNB 2.80 126.00
PREPARATION FOR ORAL ARGUMENT; LEGAL RESEARCH ON DISTRICT COURT'S DISCRETION TO ISSUE AN INJUNCTION UPON A FINDING OF A STATUTORY VIOLATION.

06-03-86 MJC 1.20 48.00
ANALYZE CITY'S REPLY TO CLEAN DUMP-BANK; REVIEW STATUS OF POLLUTION CONTROL SYSTEMS; TELEPHONE CONFERENCE WITH VERMONT WATER RESOURCES DEPARTMENT REGARDING SAME.

06-04-86 MJC 4.30 172.00
ANALYZE NEW GAS READINGS IN YARD; TELEPHONE CONFERENCE WITH BILL AHEARN REGARDING STATUS OF GAS-LEACHATE COLLECTION SYSTEMS; SITE INSPECTION OF SAME; REVIEW DISCOVERY RESPONSES BY CITY REGARDING DOCUMENTS RELATING TO OPERATION OF LANDFILL; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

06-05-86 MJC 1.60 64.00
DRAFT LETTER TO CITY REGARDING CLEANUP OF EMBANKMENT.

06-06-86 MJC 1.30 52.00
REVIEW AND EDIT LETTER TO CITY REGARDING CLEANUP OF EMBANKMENT.

06-08-86 WWP 2.50 212.50
ANALYZE PROCEDURES; REVIEW NOTICE DOCUMENTS; OUTLINE ARGUMENT AND ORGANIZE APPEAL NOTEBOOK.

06-09-86 RNB 2.30 103.50
REVIEW EPA'S NEW REGULATIONS BANNING LAND DISPOSAL OF SPECIFIED HAZARDOUS WASTES BY NOVEMBER 1986; TELEPHONE CONFERENCE WITH DR. FRANK REED.

06-09-86 MJC 0.80 32.00
ANALYZE STATE POSITION ON "LEAKING" WASTES; DRAFT LETTER TO CITY REGARDING GAS SYSTEM.

06-10-86 RNB 4.60 207.00
THOROUGH REVIEW OF "AN OVERVIEW OF HAZARDOUS WASTE REGULATION UNDER RCRA"; DRAFT MEMORANDUM REGARDING SAME.

06-10-86 MJC 0.50 20.00
REVISE LETTERS TO CITY REGARDING GAS COLLECTION AND CLEANUP OF EMBANKMENT.

06-11-86 WWP 4.00 340.00
REVIEW AND ANALYZE CITY'S BRIEF; PREPARE NOTEBOOK FOR ARGUMENT.

06-11-86 RNB 8.00 360.00
THOROUGH REVIEW AND ANALYSIS OF CITY'S BRIEF; CONFERENCE WITH ATTORNEY PEARSON TO DISCUSS NOTEBOOK FOR ORAL ARGUMENT AND TO DISCUSS CITY'S BRIEF; COMPILE DOCUMENTS FOR NOTEBOOK FOR ORAL ARGUMENT; REVIEW AND ANALYZE MEMORANDUM REGARDING TRADITIONAL AND SECOND CIRCUIT STANDARDS FOR PRELIMINARY INJUNCTION.

06-11-86 MJC 2.40 96.00
ASSIST IN PREPARING APPEAL NOTEBOOK; TELEPHONE CONFERENCE WITH APPEALS COURT REGARDING RETURN OF "EXTRA" COPIES OF APPENDIX; REVIEW CITY'S BRIEF; ORGNANIZE [sic] FILE.

06-12-86 WWP 2.00 170.00
EDIT LETTER TO CITY; VERIFY DOCUMENTS TO COURT AND HEARING DATE; REVIEW FIRST DRAFT OF REPLY BRIEF.

06-13-86 WWP 2.40 204.00
FURTHER ANALYZE CITY'S BRIEF; TELEPHONE CONFERENCES WITH MR. SORELL; PREPARE FOR HEARING; LOCATE DOCUMENTS; REVIEW HEARING BINDER; TELEPHONE CONFERENCE WITH MR. WADHAMS.

06-13-86 RNB 4.20 189.00
LEGAL RESEARCH ON ABANDOMENT [sic] OR WAIVER OF A CLAIM ON APPEAL; COMPILE DOCUMENTS FOR NOTEBOOK FOR ORAL ARGUMENT.

06-15-86 WWP 3.50 297.50
REVIEW LEGISLATIVE HISTORY FOR 1984 AMENDMENTS; REVIEW AND ANALYZE BRIEFS.

06-16-86 WWP 1.50 127.50
TELEPHONE CONFERENCE WITH MR. DAGUE; EDIT LETTERS; FURTHER ANALYSIS OF CITY'S BRIEF.

06-16-86 RNB 1.50 67.50
CONFERENCE WITH ATTORNEY PEARSON REGARDING RE-SCHEDULING OF ORAL ARGUMENT AND DISCUSSION OF "HARZARDOUS [sic] AND SOLID WASTE AMENDMENTS OF 1984"; FURTHER ANALYSIS OF MEMORANDUM ON STATUTORY INJUNCTIONS.

06-16-86 MJC 1.80 72.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, SR. REGARDING LETTER TO CITY PERMITTING CLEANUP OF EMBANKMENT; CONFERENCE WITH ERNIE DAGUE, SR. REGARDING SAME; REVISE LETTER OF AGREEMENT WITH CITY.

06-17-86 WWP 1.50 127.50
TELEPHONE CONFERENCE WITH COURT; TELEPHONE CONFERENCE WITH MR. CLAPP; MOTION AND AFFIDAVIT TO COURT REGARDING ORAL ARGUMENT DATE.

06-17-86 RNB 1.80 81.00
COMPILE RCRA'S CRITERIA FOR CLASSIFICATION OF SANITARY LANDFILLS FOR NOTEBOOK FOR ORAL ARGUMENT.

06-18-86 RNB 0.70 31.50
REVISE REPLY BRIEF.

06-18-86 MJC 3.30 132.00
CONFERENCE WITH DON BESSETTE REGARDING SIGNING OF AGREEMENT WITH CITY TO CLEAN UP BANK; FILE MAINTENANCE; SEND BRIEFS TO CLIENTS; CONFERENCE WITH MR. BESSETTE REGARDING CONSTRUCTION PLAN ON HIS MOTHERS'S PROPERTY.

06-19-86 WWP 2.40 204.00
REVIEW STATE PLAN AND 1984 RCRA AMENDMENTS; PREPARE FOR ORAL ARGUMENT; REVIEW ARGUMENT NOTEBOOK.

06-19-86 MJC 0.50 20.00
TELEPHONE CONFERENCE WITH BILL AHERN AND BOB SIMPSON REGARDING RELEASE OF CITY MEMORANDUM STATING COMPLETION OF METHANE GAS AND LEACHATE SYSTEMS.

06-22-86 RNB 0.80 36.00
DISCUSS REPLY BRIEF WITH ATTORNEY PEARSON AND PREPARATION FOR TRIAL.

06-22-86 MJC 0.50 20.00
PLAN FOR TRIAL.

06-23-86 WWP 2.50 212.50
DRAFT REPLY BRIEF.

06-23-86 RNB 3.50 157.50
DRAFT TABLE OF CONTENTS AND TABLE OF CASES AND STATUTES FOR REPLY BRIEF; THOROUGH PROOFREAD OF REPLY BRIEF.

06-23-86 MJC 3.00 120.00
DRAFT CERTIFICATE OF SERVICE AND ENCLOSURE LETTER TO COURT FOR FILING REPLY BRIEF; PROOFREAD REPLY BRIEF; ORGANIZE COPYING AND DISTRIBUTION

OF REPLY BRIEF; DELIVER TO ATTORNEY CLAPP; SEND COPIES OF ALL BRIEFS TO CLIENTS.

06-24-86 RNB 4.90 220.50
DRAFT STATEMENT OF THE CASE AND OUTLINE OF FIRST ARGUMENT FOR ORAL ARGUMENT; REVIEW AND ANALYZE LEACHATE TEST RESULTS.

06-25-86 RNB 5.20 234.00
DRAFT SECOND AND THIRD ARGUMENTS FOR ORAL ARGUMENT.

06-25-86 MJC 4.20 168.00
ORGANIZE FACT FILE; REVIEW MOREAU DEPOSITION EXHIBITS; REVIEW AND ANALYZE WATER TEST RESULTS.

07-03-86 MJC 0.60 24.00
FILE ORGANIZATION AND INDEXING.

07-07-86 MJC 0.30 12.00
LETTER TO COURT REQUESTING ESTIMATE OF HEARING TRANSCRIPT-TAPE COSTS.

07-08-86 RNB 0.50 32.50
REVIEW CITY'S MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS AND CITY'S MOTION TO JOIN ADDITIONAL DEFENDANTS.

07-10-86 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING STATUS OF CASE.

07-10-86 MJC 0.30 12.00
FILE MAINTENANCE.

07-17-86 RNB 1.30 84.50
LEGAL RESEARCH ON IMPOSITION OF CIVIL PENALTIES FOR PAST VIOLATIONS OF THE CLEAN WATER ACT.

07-22-86 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH MAGISTRATE'S CLERK REGARDING HEARING ON THIRD-PARTY DEFENDANTS' MOTIONS.

07-23-86 WWP 0.40 40.00
REVIEW OF CASE.

07-23-86 RNB 0.40 26.00
REVIEW THIRD-PARTY DEFENDANT G.E.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT MOTION TO DISMISS.

07-23-86 DL 4.00 120.00
LEGAL RESEARCH AND MEMORANDUM ON MANDATORY INJUNCTIONS.

07-24-86 RNB 0.60 39.00
THOROUGH REVIEW AND EDIT OF MEMORANDUM REGARDING MANDATORY INJUNCTIONS.

07-31-86 RNB 1.50 97.50
PREPARE FOR ORAL ARGUMENT ON APPEAL; REVIEW THIRD-PARTY DEFENDANT'S MEMORANDUM IN OPPOSITION TO CITY'S MOTION TO JOIN ADDITIONAL DEFENDANTS.

07-31-86 MJC 2.50 100.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING STATUS OF DUMP CLEANUP AND GAS TESTING.

08-06-86 RNB 2.40 156.00
FURTHER PREPARATION FOR ORAL ARGUMENT; DRAFT LIST OF QUESTIONS LIKELY

TO BE RAISED AT ORAL ARGUMENT; TELEPHONE CONFERENCE WITH ENVIRONMENTAL TASK FORCE.

08-08-86 WWP 1.00 100.00
PREPARE FOR ORAL ARGUMENT.

08-10-86 WWP 3.60 360.00
PREPARE FOR ORAL ARGUMENT.

08-12-86 WWP 3.00 300.00
PREPARE FOR ORAL ARGUMENT.

08-12-86 RNB 6.40 416.00
SITE INVESTIGATION; PREPARATION FOR ORAL ARGUMENT.

08-13-86 WWP 8.00 800.00
PREPARE FOR TOMORROW'S ARGUMENT; TRAVEL TO NYC.

08-13-86 RNB 8.50 552.50
LEGAL RESEARCH ON NOTICE PROVISIONS OF RCRA AND THE CWA; PREPARATION FOR ORAL ARGUMENT.

08-14-86 WWP 8.00 800.00
ORAL ARGUMENT AT SECOND CIRCUIT.

08-14-86 RNB 8.00 520.00
FURTHER PREPARATION FOR ORAL ARGUMENT AND ATTEND ORAL ARGUMENT.

08-18-86 WWP 1.50 150.00
REVIEW SECOND CIRCUIT HEARING AND REFILE DOCUMENTS; ORGANIZE THIRD PARTY PARTICIPATION.

08-18-86 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING ORAL ARGUMENT AT COURT OF APPEALS.

08-18-86 MJC 1.50 60.00
FILE MAINTENANCE; ASSEMBLE THIRD-PARTY PLEADINGS NOTEBOOK.

08-20-86 WWP 1.00 100.00
TELEPHONE CONFERENCE WITH COURT; REVIEW AND ANALYZE DECISION OF COURT OF APPEALS.

08-21-86 WWP 5.00 500.00
ANALYZE ALL OPTIONS FOR APPEAL; TRIAL PREPARATION; ANALYZE CITY'S COMPLIANCE WITH ORDER.

08-21-86 RNB 1.50 97.50
CONFERENCE WITH ATTORNEY PEARSON TO DISCUSS DECISION AND POSSIBLE APPEAL FROM SECOND CIRCUIT; PLAN DISCOVERY IN PREPARATION FOR TRIAL.

08-25-86 WWP 2.50 250.00
READ THIRD-PARTY PLEADINGS; REVIEW NOTICE ARGUMENTS.

08-25-86 MJC 1.30 52.00
DRAFT MOTION TO COMPEL TO CITY; DRAFT WITNESS TESTIMONY LIST; TELEPHONE CONFERENCE WITH COURT TO ORDER TAPES OF OGDEN TESTIMONY.

08-26-86 WWP 2.50 250.00
PREPARE FOR TOMORROW'S HEARING; ANALYZE NEED FOR ADDITIONAL EXPERTS; REVIEW DISCOVERY STATUS; OUTLINE PRESENTATION FOR HEARING.

08-26-86 RNB 3.50 227.50
PREPARATION FOR HEARING ON MOTIONS TO DISMISS THIRD-PARTY COMPLAINT AND ON MOTION TO JOIN ADDITIONAL PARTY DEFENDANTS; LEGAL RESEARCH ON JOINDER OF JOINT TORTFEASORS UNDER RCRA.

08-27-86 WWP 3.00 300.00
ATTEND HEARING; ORGANIZE FURTHER DISCOVERY.

08-27-86 RNB 3.00 195.00
PREPARATION FOR AND ATTEND HEARING ON MOTIONS TO DISMISS THIRD-PARTY COMPLAINT AND MOTION TO JOIN ADDITIONAL PARTY DEFENDANTS.

08-27-86 MJC 2.30 92.00
ORGANIZE FILE; LETTER TO MAGISTRATE; DRAFT AND EDIT REQUESTS TO ADMIT.

08-28-86 MJC 1.00 40.00
REVISE LETTER TO MAGISTRATE; REVISE REQUESTS TO ADMIT; REVISE FILE INDEX.

08-29-86 WWP 0.60 60.00
ANALYZE TRIAL EXPERTS; STATUS CHECK ON ADDITIONAL DISCOVERY.

09-02-86 MJC 0.70 28.00
REVIEW FILE; TELEPHONE CONFERENCE WITH UVM MAP OFFICE FOR EARLY AERIAL PHOTOS OF LANDFILL.

09-03-86 RNB 1.00 65.00
REVIEW AND EDIT FIRST SET OF REQUESTS FOR ADMISSION.

09-03-86 MJC 4.20 168.00
FACT RESEARCH ON AVAILABILITY OF EARLY AERIAL PHOTOS OF LANDFILL; CONFERENCE WITH UVM NATURAL RESOURCES, LIBRARY AND GEOGRAPHY DEPARTMENTS; LETTER TO ATTORNEY CLAPP REGARDING DEPOSITION SIGNATURES.

09-04-86 RNB 0.70 45.50
REVIEW AND ANALYSIS OF REQUESTS FOR ADMISSION.

09-05-86 MJC 1.50 60.00
TELEPHONE CONFERENCE WITH NATIONAL ARCHIVES REGARDING PRINTS OF EARLY LANDFILL PHOTOS; REVISE REQUESTS FOR ADMISSION TO CITY; DRAFT CERTIFICATE OF SERVICE.

09-08-86 WWP 0.80 80.00
REVIEW AND ANALYZE AERIAL PHOTOS OF LANDFILL.

09-09-86 MJC 2.00 80.00
DRAFT ADDITIONAL REQUESTS FOR ADMISSION REGARDING STATE CLAIMS; REVIEW FILE.

09-10-86 MJC 0.60 24.00
REVISE REQUESTS FOR ADMISSION.

09-11-86 RNB 1.10 71.50
THOROUGH REVIEW OF PLAINTIFFS' SECOND SET OF REQUESTS FOR ADMISSION; REVIEW AND REVISE PLAINTIFFS' MOTION TO COMPEL.

09-11-86 MJC 2.00 80.00
PLAN FOR FURTHER WORK TO BE DONE; DRAFT MOTION TO COMPEL TO CITY AND CERTIFICATE OF SERVICE; TELEPHONE CONFERENCE WITH COURT REGARDING OGDEN TESTIMONY TAPES.

09-15-86 WWP 0.30 30.00
REVIEW LETTERS FROM ALLAN KEYES.

09-15-86 RNB 0.50 32.50
LEGAL RESEARCH ON WYCKOFF CO. DECISION WHICH HOLDS THAT STATE HAZARDOUS WASTE PROGRAMS DON'T DISPLACE FEDERAL AUTHORITY.

09-17-86 MJC 0.80 32.00
TELEPHONE CONFERENCE WITH BETTY DAGUE REGARDING QUESTION FROM LANDFILL OPERATOR; FILE MAINTENANCE; MEMORANDUM TO ATTORNEY PEARSON REGARDING RELEASE OF HAGAR LETTER; TELEPHONE CONFERENCE WITH DAGUES.

09-23-86 MJC 1.20 48.00
REVIEW FILE; DRAFT AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL.

09-24-86 MJC 0.30 12.00
REVISE AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL.

09-30-86 WWP 2.00 200.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE; TRIP TO LANDFILL.

09-30-86 RNB 1.50 97.50
SITE INVESTIGATION OF DAGUE PROPERTY AND LANDFILL.

09-30-86 MJC 1.50 60.00
TRIP TO LANDFILL.

10-01-86 WWP 0.30 30.00
SERVICE AND FILING OF REQUESTS TO ADMIT.

10-01-86 MJC 1.40 56.00
DRAFT ADDITIONAL REQUESTS TO PRODUCE.

10-03-86 WWP 0.30 30.00
SERVICE AND FILING OF AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL.

10-07-86 MJC 0.60 24.00
ORGANIZE FILE.

10-08-86 WWP 0.50 50.00
REVIEW GE'S RESPONSE TO REQUESTS TO ADMIT.

10-08-86 RNB 0.60 39.00
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING MALFUNCTION OF METHANE GAS ALARM; LETTER TO ATTORNEY CLAPP REGARDING INSTALLATION OF A TEMPORARY METHANE GAS ALARM IN THE DAGUE'S BASEMENT.

10-09-86 WWP 1.00 100.00
ANALYZE OPTIONS IN LIGHT OF CITY'S FAILURE TO RESPOND TO REQUESTS TO ADMIT.

10-10-86 WWP 2.70 270.00
ANALYZE CITY'S RESPONSES TO REQUESTS TO ADMIT AND INTERROGATORIES; ANALYZE RESPONSE STRATEGY.

10-10-86 RNB 5.50 357.50
THOROUGH REVIEW OF CITY'S RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION; LEGAL RESEARCH ON F.R.C.P. 36(A); INITIAL DRAFT OF PLAINTIFFS' MOTION FOR SANCTIONS ON CITY'S RESPONSES TO REQUESTS FOR ADMISSION.

10-10-86 MJC 2.40 96.00
EXAMINE EARLY AERIAL PHOTOS; ANALYZE CITY'S RESPONSES TO INTERROGATORIES, REQUESTS TO PRODUCE, AND REQUESTS TO ADMIT; ANALYZE SETTLEMENT POSSIBILITIES; FILE AND SERVE MOTION TO STRIKE.

10-13-86 WWP 3.20 320.00
REVIEW RESPONSE TO CITY'S INSUFFICIENT ANSWERS; EDIT LETTER; EXAMINE DOCUMENT ATTACHMENTS; RESEARCH APPLICATION OF RULE 36 SANCTIONS.

10-13-86 RNB 2.00 130.00
REVISE PLAINTIFFS' MOTION TO DETERMINE THE SUFFICIENCY OF DEFENDANT'S ANSWERS AND OBJECTIONS TO REQUESTS FOR ADMISSION; THOROUGH REVIEW AND ANALYSIS OF DEFENDANT'S RESPONSES TO PLAINTIFFS' INTERROGATORIES AND REQUESTS TO PRODUCE DATED MARCH 13, 1986.

10-13-86 MJC 3.30 132.00
REVIEW AND ANALYZE CITY'S RESPONSES TO DISCOVERY; REVIEW FILE AND DRAFT MEMORANDA REGARDING CONTROVERTING EVIDENCE.

10-14-86 WWP 1.00 100.00
REVIEW AND ANALYZE MOTION REGARDING INSUFFICIENCY OF CITY'S ANSWERS.

10-14-86 RNB 3.30 214.50
FACT RESEARCH CONCERNING CITY'S DOCUMENTS AND TESTIMONY THAT REFUTE DEFENDANT'S GENERAL DENIALS AND OBJECTIONS TO REQUESTS FOR ADMISSION; DRAFT SECOND ARGUMENT IN PLAINTIFFS' MOTION TO DETERMINE THE SUFFICIENCY OF THE CITY'S ANSWERS AND OBJECTIONS TO REQUESTS FOR ADMISSION.

10-14-86 MJC 3.80 152.00
FURTHER REVIEW OF DEFENDANT'S RESPONSES TO REQUESTS TO ADMIT; DRAFT RESPONSE DOCUMENT REGARDING INSUFFICIENCY OF RESPONSES.

10-15-86 WWP 1.00 100.00
ANALYZE PLAINTIFFS' SUPPORTING MEMORANDUM; LETTER TO MR. CLAPP.

10-15-86 MJC 1.80 72.00
REVIEW CITY'S RESPONSES TO INTERROGATORIES; COMPILE CONTROVERTING DOCUMENTS.

10-16-86 WWP 0.50 50.00
REVIEW AND EDIT RESPONSES TO INTERROGATORIES.

10-16-86 RNB 1.50 97.50
DETAILED ANALYSIS OF DEFENDANT'S RESPONSES TO PLAINTIFFS' REQUESTS TO PRODUCE AND INTERROGATORIES.

10-21-86 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH JAN MORRISSEY, A PARALEGAL OF DINSE ERDMAN & CLAPP, REGARDING COPYING OF PLAINTIFFS' EXHIBITS.

10-21-86 MJC 0.80 32.00
MEETING WITH PARALEGAL FROM CITY REGARDING PHOTOCOPYING OF EXHIBITS.

10-27-86 WWP 1.20 120.00
REVIEW AND ANALYZE CITY'S REQUEST FOR DOCUMENTS.

10-27-86 RNB 1.20 78.00
ANALYZE RESPONSE TO DEFENDANT'S REQUESTS TO PRODUCE.

10-27-86 MJC 0.80 32.00
REVIEW FILE FOR ORIGINAL CITY DOCUMENTS.

10-29-86 MJC 1.20 48.00
REVIEW AUDIO TAPE OF OGDEN TESTIMONY, OTHER TAPES, AND PHOTOS;

OBTAIN TRANSCRIPT OF OGDEN TESTIMONY.

10-31-86 WWP 1.00 100.00
REVIEW AND ANALYZE MAGISTRATE'S DECISION; ANALYZE IMPACT ON CASE.

10-31-86 RNB 0.50 32.50
REVIEW AND ANALYZE MAGISTRATE'S REPORT AND RECOMMENDATION ON THE CITY'S MOTION TO JOIN AND THE THIRD-PARTY DEFENDANTS' MOTION TO DISMISS THIRD-PARTY COMPLAINT.

11-03-86 WWP 0.80 80.00
REVIEW GAS METER OPTIONS; REVIEW MR. CLAPP'S LETTER.

11-03-86 MJC 2.40 96.00
REVIEW TRANSCRIPT OF OGDEN TESTIMONY; REVISE AND FILE SAME; REVIEW CORRESPONDENCE FROM ATTORNEY CLAPP AND DRAFT RESPONSE LETTER; TELEPHONE CONFERENCE WITH CLIENT REGARDING RECALIBRATION OF GAS METER; DELIVER COPIES OF ATTORNEY CLAPP'S LETTER AND MAGISTRATE'S ORDER TO CLIENT.

11-04-86 WWP 0.60 60.00
FURTHER REVIEW OF MR. CLAPP'S LETTER; FORMULATE REPLY.

11-04-86 MJC 1.50 60.00
REVIEW FILE AND OUTLINE QUESTIONS FOR WITNESS INTERVIEWS.

11-05-86 WWP 1.00 100.00
REVIEW STATUS OF PLEADINGS AND DISCOVERY; ANALYZE PROPOSED ORDER.

11-05-86 RNB 1.80 117.00
ANALYSIS OF PLAINTIFFS' RESPONSE TO DEFENDANT'S REQUESTS TO PRODUCE; DRAFT PROPOSED ORDER.

1-05-86 MJC 1.30 52.00
PLAN DISCOVERY AND ANALYZE SETTLEMENT POSSIBILITIES; DRAFT LETTER TO ATTORNEY CLAPP FOR RETURN OF ORIGINAL DOCUMENTS.

11-07-86 WWP 1.00 100.00
LETTER TO COURT REGARDING PROPOSED ORDER.

11-07-86 MJC 0.30 12.00
TELEPHONE CONFERENCE WITH SECRETARY OF STATE REGARDING VAEC WASTE MANAGEMENT REGULATIONS.

11-10-86 MJC 1.00 40.00
REVIEW PROPOSED DISCOVERY ORDER; FILE MAINTENANCE; MEMORANDUM REGARDING DOCUMENTS TO BE COPIED AT ATTORNEY CLAPP'S OFFICE; TELEPHONE CONFERENCE WITH CLIENT REGARDING RECALIBRATION OF GAS METER; MEMORANDUM REGARDING SAME.

11-12-86 WWP 1.00 100.00
REVIEW CITY'S MOTION TO ENLARGE; ANALYZE RESPONSE.

11-12-86 RNB 3.50 227.50
ANALYSIS OF DEFENDANT'S MOTION TO ENLARGE TIME AND BEGIN DRAFTING PLAINTIFFS' MEMORANDUM IN OPPOSITION THERETO; ANALYSIS OF PRE-TRIAL STRATEGY.

11-13-86 RNB 1.00 65.00
ANALYSIS OF THIRD-PARTY DEFENDANT GENERAL ELECTRIC COMPANY'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION DATED 30 OCTOBER 1986.

11-17-86 WWP 0.60 60.00
REVIEW DISCOVERY STATUS; REVIEW GAS METER CALIBRATION ISSUE.

11-17-86 RNB 0.40 26.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING STATUS OF CASE AND HIS AVAILABILITY FOR TRIAL.

11-19-86 WWP 1.50 150.00
REVIEW MOTION TO COMPEL, AFFIDAVIT, MEMORANDUM IN OPPOSITION TO MOTION TO ENLARGE, AND RESPONSE TO REQUEST TO PRODUCE.

11-19-86 RNB 6.30 409.50
DRAFT PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO ENLARGE TIME AND PLAINTIFFS' RESPONSE TO DEFENDANT'S REQUEST TO PRODUCE DATED OCTOBER 20, 1986; INITIAL REVIEW AND EDIT OF PLAINTIFFS' MOTION TO COMPEL, ALONG WITH SUPPORTING AFFIDAVIT; REVIEW THIRD-PARTY DEFENDANT E.B. AND A.C. WHITING COMPANY'S MOTION FOR LEAVE TO FILE OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION DATED OCTOBER 30, 1986 OUT OF TIME.

11-21-86 WWP 0.70 70.00
TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE; ANALYZE DISCOVERY OPTIONS.

11-24-86 WWP 0.60 60.00
OUTLINE MEMORANDUM TO ACCOMPANY MOTION TO COMPEL; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE.

11-24-86 MJC 0.80 32.00
PLAN FURTHER WORK FOR MOTION TO COMPEL; FILE MAINTENANCE.

11-25-86 MJC 1.50 60.00
DRAFT MEMORANDUM REGARDING DEFICIENCIES IN DEFENDANT'S DISCOVERY RESPONSES.

11-26-86 WWP 0.30 30.00
REVIEW MEMORANDUM FOR MOTION TO COMPEL.

11-26-86 MJC 0.50 20.00
REVISE MEMORANDUM REGARDING DISCOVERY DEFICIENCIES.

12-10-86 WWP 0.60 60.00
REVIEW FACTS AND MOTION TO COMPEL.

12-11-86 RNB 2.00 130.00
REVISE PLAINTIFFS' MOTION TO COMPEL WITH SUPPORTING MEMORANDUM AND AND [sic] AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL.

12-12-86 WWP 0.50 50.00
REVIEW AND SEND MOTION TO COMPEL; ANALYZE ISSUES FOR TRIAL.

12-17-86 WWP 0.60 60.00
ANALYZE OUTSTANDING MOTIONS; TELEPHONE CONFERENCE WITH COURT ON MOTION STATUS.

12-29-86 WWP 1.50 150.00
REVIEW MOTIONS FILED BY G.E., BLODGETT COMPANY AND E.B. AND A.C. WHITING COMPANY.

12-29-86 MJC 0.20 8.00
FILE MAINTENANCE.

01-09-87 RNB 0.50 32.50
ANALYSIS OF THIRD PARTIES' MEMORANDA IN OPPOSITION TO MAGISTRATE'S REPORT AND RECOMMENDATION OF OCTOBER 30, 1986.

01-09-87 MJC 1.00 40.00
PREPARE THIRD-PARTY PLEADINGS INDEX; MEMORANDUM REGARDING OUTSTANDING MOTIONS AND DISCOVERY.

01-12-87 WWP 0.40 40.00
REVIEW STRATEGY TO PRESSURE COURT ACTION; REVIEW LIST OF OUTSTANDING PLEADINGS AND DISCOVERY.

01-12-87 RNB 0.30 19.50
ANALYSIS OF PENDING MOTIONS AND OUTSTANDING DISCOVERY.

01-12-87 MJC 0.50 20.00
CONFERENCE REGARDING MANAGEMENT OF LAWSUIT, OUTSTANDING MOTIONS AND DISCOVERY; REVISE MEMORANDUM REGARDING SAME; REVIEW FILE.

01-13-87 WWP 1.00 100.00
ANALYZE STATE DISMISSAL OF SUIT AGAINST CITY; FURTHER REVIEW OF PLEADINGS AND DISCOVERY.

01/13/87 MJC 0.30 12.00
REVIEW NEWS AND CLIP FOR FILE.

01/14/87 WWP 0.30 30.00
REVIEW STATUS CONFERENCE REQUEST UNDER LOCAL RULES.

01/20/87 WWP 0.30 30.00
REVIEW HAGAR HARDWARE'S AND G.E.'S MOTIONS TO COMPEL.

01/20/87 WWP 0.30 30.00
REVIEW G.E. MOTION.

01/26/87 MJC 1.20 48.00
REVISE ANALYSIS OF DISCOVERY RESPONSES.

01/27/87 WWP 0.60 60.00
REVIEW SUPPLEMENTAL INTERROGATORIES AND REQUESTS TO PRODUCE.

01/27/87 MJC 1.60 64.00
REVIEW CITY'S SUPPLEMENTAL DISCOVERY RESPONSES; MEMORANDUM REGARDING SAME; TELEPHONE CONFERENCE WITH VERMONT PUBLIC INTEREST GROUP REGARDING LANDFILL REPORT.

01/29/87 MJC 2.30 92.00
FURTHER REVIEW OF CITY'S SUPPLEMENTAL DISCOVERY RESPONSES; COMPLETE ANALYSIS OF SAME AND MEMORANDUM.

01/29/87 MJC 0.30 12.00
ARRANGE FOR DUPLICATION OF TAPED STATEMENTS.

02/04/87 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING CITY'S MEMORANDUM IN OPPOSITION TO MOTION FOR SEVERANCE.

02/06/87 MJC 0.40 16.00
FILE MAINTENANCE.

02/09/87 WWP 0.60 60.00
REVIEW COURT ORDER ON MAGISTRATE'S RECOMMENDATION AND ORDER; REVIEW THIRD PARTY BLODGETT'S MOTION TO SEVER.

02/09/87 RNB 1.50 97.50
REVIEW AND ANALYSIS OF JUDGE BILLINGS' 5 FEBRUARY 1987 ORDER;

02/11/87 WWP 0.40 40.00
REVIEW DOCUMENTS FROM COURT.

02/13/87 WWP 0.50 50.00
REVIEW MAGISTRATE'S ORDER AND ANALYZE OPTIONS.

02/13/87 RNB 2.50 162.50
REVIEW AND ANALYSIS OF MAGISTRATE'S 12 FEBRUARY 1987 ORDER; LEGAL RESEARCH ON STANDING ISSUE.

02/13/87 MJC 0.50 20.00
PREPARATION FOR STATUS HEARING.

02/16/87 WWP 0.30 30.00
READ MR. CLAPP'S LETTER.

02/17/87 RNB 3.00 195.00
INITIAL DRAFT OF MEMORANDUM IN SUPPORT OF PLAINTIFFS' STANDING TO BRING A CLAIM UNDER 42 U.S.C. SECTION 6972(A)(1)(B).

02/18/87 RNB 1.70 110.50
REVISE MEMORANDUM IN SUPPORT OF PLAINTIFFS' STANDING; LEGAL RESEARCH ON FEDERAL COURT AWARD OF ATTORNEYS' FEES.

02/19/87 WWP 0.50 50.00
TELEPHONE CONFERENCE WITH COURT; REVIEW LETTER TO MAGISTRATE.

02/19/87 RNB 0.20 13.00
TELEPHONE CONFERENCE WITH ATTORNEY HOAR REGARDING CITY'S RESPONSES TO INTERROGATORIES OF THIRD-PARTY DEFENDANTS.

02/19/87 MJC 1.20 48.00
MEMORANDUM REGARDING PENDING MOTIONS AND DISCOVERY; FILE MAINTENANCE; REVIEW CORRESPONDENCE REGARDING HEARING DATE.

02/25/87 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ERNIE DAGUE, JR. REGARDING CITY'S ANNUAL REPORT AND STATEMENTS MADE BY MR. GOODKIND CONCERNING THE GENERATION OF METHANE GAS AT THE LANDFILL.

02/27/87 WWP 0.60 60.00
REVIEW MR. HEMLEY'S LETTER; TELEPHONE CONFERENCE WITH MR. HEMLEY.

03/02/87 RNB 0.30 19.50
REVIEW G.E.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

03/03/87 MJC 0.50 20.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING HEARING DATE; FACT INVESTIGATION; TELEPHONE CONFERENCE WITH COURT REGARDING HEARING DATE.

03/05/87 MJC 0.30 12.00
REVIEW BURLINGTON'S ANNUAL REPORT REGARDING LANDFILL.

03/09/87 RNB 0.30 19.50
REVIEW CITY OF BURLINGTON'S ANNUAL REPORT.

03/10/87 WWP 0.50 50.00
REVIEW OUTSTANDING MOTIONS FOR STATUS CONFERENCE.

03/11/87 RNB 0.30 19.50
DISCUSSION AND ANALYSIS OF STANDING ISSUE WITH ATTORNEY PEARSON.

03/12/87 WWP 0.30 30.00
ANALYZE STANDING ISSUES FOR HEARING.

03/13/87 WWP 0.50 50.00
ANALYZE DIFFERENCES IN ANSWERS TO INTERROGATORIES.

03/16/87 WWP 2.80 280.00
REVIEW ALL OUTSTANDING MOTIONS; HEARING ON MOTIONS; CONFERENCE WITH CLIENT.

03/16/87 RNB 3.50 227.50
THOROUGH REVIEW AND ANALYSIS OF CITY'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS; PREPARATION FOR AND ATTEND HEARING ON THIRD-PARTY DEFENDANT'S MOTION TO DISMISS.

03/16/87 MJC 1.20 48.00
FILE MAINTENANCE; REVIEW STATUS OF PLEADINGS AND DISCOVERY; UPDATE MEMORANDUM REGARDING SAME; TELEPHONE CONFERENCE WITH CLIENT REGARDING HEARING.

03/17/87 MJC 0.50 20.00
PREPARATION FOR HEARING.

03/19/87 WWP 0.40 40.00
REVIEW MR. CLAPP'S LETTER; ANALYZE OPTIONS.

03/19/87 RNB 2.50 162.50
THOROUGH REVIEW AND ANALYSIS OF ATTORNEY CLAPP'S 18 MARCH 1987 LETTER TO MAGISTRATE NIEDERMEIER; IDENTIFY AND DOCUMENT INACCURACIES IN ATTORNEY CLAPP'S 18 MARCH 1987 LETTER TO MAGISTRATE NIEDERMEIER.

03/19/87 MJC 1.00 40.00
MEMORANDUM SUMMARIZING INVESTIGATION TO DATE.

03/20/87 WWP 1.00 100.00
REVIEW ANNOTATED LETTER; REVIEW OPTIONS; TELEPHONE CONFERENCE WITH MR. MCKEARIN.

03/20/87 RNB 0.70 45.50
FURTHER ANALYSIS OF ATTORNEY CLAPP'S 18 MARCH 1987 LETTER TO MAGISTRATE NIEDERMEIR AND PLAINTIFFS' RESPONSE THERETO.

03/23/87 WWP 0.20 20.00
REVIEW ITEMS TO BE COVERED IN MEETING WITH ATTORNEY CLAPP.

03/24/87 RNB 0.50 32.50
LEGAL RESEARCH ON DENIALS UNDER F.R.C.P. 36 (A) AND CASELAW THEREUNDER.

03/25/87 WWP 0.30 30.00
REVIEW DISCOVERY STATUS REGARDING CITY'S FAILURE TO MAKE MEETING.

03/25/87 RNB 0.20 13.00
MEMORANDUM TO ATTORNEY PEARSON REGARDING PLAINTIFFS' RESPONSE TO ATTORNEY CLAPP'S 3-18-87 LETTER TO THE MAGISTRATE AND EFFORTS TO DISCUSS DEFENDANT'S INSUFFICIENT RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION.

03/25/87 MJC 0.30 12.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING STATUS OF MOTIONS TO DISMISS.

03/30/87 WWP 0.50 50.00
REVIEW DISCOVERY OPTIONS.

04/02/87 RNB 0.50 32.50
DRAFT LETTER TO MAGISTRATE NEIDERMEIR.

04/03/87 WWP 1.00 100.00
EVALUATE CITY'S DISCOVERY POSITION; EDIT LETTER TO MAGISTRATE.

04/07/87 WWP 0.30 30.00
REVIEW MR. CLAPP'S LETTER.

04/08/87 WWP 0.20 20.00
TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE TO SCHEDULE MEETING.

04/08/87 MJC 0.30 12.00
REVIEW CORRESPONDENCE REGARDING DISCOVERY PROBLEMS.

04/09/87 WWP 1.50 150.00
PREPARE FOR MEETING WITH MR. CLAPP; CONFERENCE WITH MR. CLAPP.

04/09/87 RNB 1.30 84.50
PREPARE FOR AND CONFERENCE WITH ATTORNEY CLAPP REGARDING DEFENDANT'S RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION.

04/10/87 RNB 0.40 26.00
CONFERENCE WITH ATTORNEY PEARSON TO DISCUSS PROFESSOR PINDER AS AN EXPERT AND DEFENDANT'S RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION.

04/21/87 MJC 0.60 24.00
FILE MAINTENANCE.

04/28/87 MJC 1.80 72.00
ANALYZE NEED FOR WETLAND EXPERT; TELEPHONE CONFERENCE WITH PRINCETON FOR EXPERT'S PHONE NUMBERS; TELEPHONE CONFERENCE WITH ENVIRONMENTAL COMMISSIONER REGARDING STATUS OF LAMOILLE CO. LANDFILL; DRAFT NOTICE OF DEPOSITION FOR HAGAR; CONFIRM WITH FEDERAL COURT REGARDING VALIDITY OF AGED SUBPOENAS.

04/30/87 MJC 0.80 32.00
TELEPHONE CONFERENCE WITH GEORGE PINDER REGARDING HYDROLGEOLOGY; REVIEW FILE REGARDING SAME.

05/05/87 MJC 0.30 12.00
MEMORANDUM TO ATTORNEY PEARSON REGARDING TELEPHONE CONFERENCE WITH PINDER.

05/10/87 WWP 0.60 60.00
ANALYZE ATTORNEY FEES ISSUE; REVIEW DEPOSITION NOTICE.

05/12/87 MJC 0.40 16.00
TELEPHONE CONFERENCE WITH DON BESSETTE REGARDING PROPOSED CONSTRUCTION ON MOTHER'S PROPERTY; MEMORANDUM REGARDING SAME.

05/13/87 RNB 0.80 52.00
REVIEW MAGISTRATE'S REPORT AND RECOMMENDATION DATED 12 MAY 1987; PREPARATION FOR DEPOSITION OF HAGAR HARDWARE; ANALYSIS OF SETTLEMENT STRATEGIES.

05/13/87 MJC 0.30 12.00
MEMORANDUM TO ATTORNEY BLAND REGARDING HAGAR DEPOSITION.

05/14/87 MJC 0.30 12.00
TELEPHONE CONFERENCE WITH ATTORNEY KEYES TO SCHEDULE HAGAR DEPOSITION.

05/18/87 MJC 0.80 32.00
TELEPHONE CONFERENCE WITH CLIENT REGARDING WINDBLOWN TRASH PROBLEM; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME; TELEPHONE CONFERENCE WITH ATTORNEY KEYES REGARDING HAGAR DEPOSITION.

05/25/87 WWP 0.30 30.00
STATUS REVIEW.

05/26/87 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING CITY'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS DATED 5-12-87.

05/27/87 WWP 0.40 40.00
REVIEW MAGISTRATE'S ORDER AND CITY'S APPEAL.

05/27/87 RNB 0.40 26.00
REVIEW CITY'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION DATED 5-12-87.

06/02/87 MJC 0.50 20.00
ANALYSIS OF CLIENT CONTACT ISSUES; TELEPHONE CONFERENCE WITH ERNEST DAGUE TO SCHEDULE MEETING.

06/03/87 WWP 0.40 40.00
REVIEW CLIENT PROBLEMS WITH CITY.

06/03/87 MJC 0.70 28.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING PERMISSION TO DEAL WITH GOODKIND FOR BUILDING PERMIT; TELEPHONE CONFERENCE WITH ERNIE DAGUE REGARDING STATUS OF CASE; TELEPHONE CONFERENCE WITH ATTORNEY KEYES REGARDING HAGAR DEPOSITION.

06/05/87 RNB 0.60 39.00
REVIEW G.E.'S AND WHITING'S RESPONSES TO CITY'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION DATED 12 MAY 1987.

06/05/87 MJC 1.20 48.00
REVIEW MEMORANDA SUPPORTING DISMISSAL OF THIRD-PARTY DEFENDANTS; FILE MAINTENANCE; REVIEW NEWS REGARDING LOCAL LANDFILLING; DRAFT NOTICE FOR HAGAR DEPOSITION.

06/09/87 WWP 1.00 100.00
REVIEW THIRD PARTY'S RESPONSE TO CITY'S OBJECTION TO MAGISTRATE'S REPORT.

06/09/87 MJC 0.60 24.00
REVISE HAGAR DEPOSITION NOTICE; TELEPHONE CONFERENCE WITH ATTORNEY KEYES TO CONFIRM DEPOSITION DATE; DRAFT DISCOVERY CERTIFICATE AND LETTER TO COURT.

06/10/87 WWP 1.30 130.00
CONFERENCE WITH CLIENTS; REVIEW MEMORANDUM REGARDING COMPLIANCE WITH ASSURANCE.

06/10/87 RNB 1.00 65.00
STATUS CONFERENCE WITH ERNIE DAGUE, JR., AND ERNIE DAGUE, SR.

06/10/87 MJC 1.60 64.00
MEETING WITH CLIENTS REGARDING STATUS OF CASE; TELEPHONE CONFERENCE WITH JULIE HACKBARTH REGARDING COMPLIANCE BY CITY WITH TERMS OF LATEST ASSURANCE OF DISCONTINUANCE; MEMORANDUM REGARDING SAME.

06/11/87 RNB 0.30 19.50
TELEPHONE CONFERENCE WITH ATTORNEY CULLIN REGARDING DEPOSITION OF HAGAR HARDWARE COMPANY.

06/11/87 MJC 0.30 12.00
REVIEW HAGAR'S OBJECTIONS TO MAGISTRATE'S ORDER; FILE MAINTENANCE.

06/12/87 MJC 0.50 20.00
EXTENDED TELEPHONE CONFERENCE WITH JULIE HACKBARTH REGARDING CITY COMPLIANCE WITH ASSURANCE OF DISCONTINUANCE.

06/15/87 MJC 0.60 24.00
MEMORANDUM REGARDING TELEPHONE CONFERENCE WITH JULIE HACKBARTH; PREPARATION FOR HAGAR DEPOSITION.

06/16/87 RNB 0.60 39.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING HIS UNAVAILABILITY FOR DEPOSITION OF HAGAR HARDWARE COMPANY; REVIEW LEGAL ASSISTANT CASE'S MEMORANDUM REGARDING HIS TELEPHONE CONFERENCE WITH JULIE HACKBARTH OF VAEC.

06/17/87 WWP 0.30 30.00
PREPARE OUTLINE FOR FURTHER WORK TO BE DONE.

06/18/87 MJC 3.50 140.00
REVIEW VAEC FILES FOR LANDFILL INSPECTION REPORTS, WATER TEST RESULTS, AND RECENT CORRESPONDENCE; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

06/23/87 MJC 1.20 48.00
REVIEW SETTLEMENT STRATEGY MEMORANDUM AND WORK TO DO IN PREPARATION FOR SETTLEMENT CONFERENCE AND® OR TRIAL; FILE MAINTENANCE.

06/25/87 RNB 0.40 26.00
LEGAL RESEARCH ON CITIZEN SUITS FOR PAST VIOLATIONS OF CLEAN WATER ACT.

07/07/87 RNB 1.50 105.00
INITIAL DRAFT OF DEMAND LETTER TO ATTORNEY CLAPP; REVISE SAME.

07/07/87 MJC 0.40 18.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP FOR DEPOSITION DATES; REVIEW CORRESPONDENCE FROM ATTORNEY KEYES REGARDING SAME; LETTER TO ATTORNEY KEYES REGARDING SAME.

07/08/87 WWP 0.30 34.50
REVIEW OPPOSITION TO AMENDMENT TO THIRD-PARTY COMPLAINT.

07/08/87 RNB 0.30 21.00
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING CITY'S MOTION TO AMEND THIRD-PARTY COMPLAINT.

07/08/87 MJC 0.30 13.50
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING HAGAR DEPOSITION.

07/09/87 RNB 0.30 21.00
REVIEW MEMORANDUM IN OPPOSITION TO CITY'S MOTION TO AMEND THIRD-PARTY COMPLAINT.

07/14/87 WWP 0.40 46.00
REVIEW RECENT FILINGS ON CITY'S MOTION TO AMEND.

07/28/87 MJC 0.50 22.50
TELEPHONE CONFERENCE WITH ATTORNEY KEYES REGARDING SCHEDULING HAGAR DEPOSITION; MEMORANDUM TO ATTORNEY BLAND REGARDING SAME.

07/31/87 MJC 0.40 18.00
RENOTICE DEPOSITION OF HAGAR.

08/03/87 MJC 4.00 180.00
REVIEW AEC WATER TESTS, INSPECTION REPORTS, AND 1986 CORRESPONDENCE; TELEPHONE CONFERENCE WITH WITNESSES FOR FURTHER INFORMATION.

08/14/87 WWP 0.50 57.50
LETTER TO DR. REED.

08/16/87 RNB 1.50 105.00
REVIEW HAGAR HARDWARE DOCUMENTS AND DEPOSITIONS OF OTHER THIRD-PARTY DEFENDANTS IN PREPARATION FOR DEPOSITION OF HAGAR HARDWARE.

08/17/87 WWP 0.50 57.50
TELEPHONE CONFERENCE WITH DR. REED'S OFFICE; ANALYZE STATUS.

08/18/87 WWP 0.30 34.50
TELEPHONE CONFERENCE WITH DR. FRANK REED.

08/19/87 WWP 0.80 92.00
REVIEW THIRD-PARTY STRATEGY AND INSURANCE COVERAGE ISSUES; MEMORANDUM ON LANDFILL EMPLOYEES.

08/19/87 RNB 3.90 273.00
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING DEPOSITION OF HAGAR HARDWARE AND INSURANCE COVERAGE FOR THIRD-PARTY DEFENDANTS; PREPARATION FOR AND DEPOSITION OF G. HENRY HAGAR; STATUS REPORT TO ATTORNEY PEARSON.

08/20/87 WWP 0.80 92.00
REVIEW HAGAR HARDWARE DEPOSITION; CONFERENCE WITH MR. WADHAMS ON THIRD-PARTY STATUS AND SETTLEMENT OPTIONS.

08/24/87 MJC 0.50 22.50
STATUS LETTER TO CLIENT.

08/31/87 WWP 0.30 34.50
ANALYZE THIRD-PARTY GENERATOR ISSUES UNDER RCRA.

09/04/87 RNB 0.40 28.00
REVIEW AND ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER GRANTING THIRD-PARTY DEFENDANTS' MOTIONS TO DISMISS.

09/24/87 MJC 0.40 18.00
PLAN FOR FURTHER WORK TO BE DONE ON CASE.

09/25/87 WWP 1.50 172.50
REVIEW STATUS IN PREPARATION FOR OCTOBER 1 CONFERENCE; CONFERENCE WITH CLIENTS.

09/28/87 RNB 0.30 21.00
PREPARATION FOR STATUS CONFERENCE AND ANALYSIS OF DISCOVERY MATTERS IN PREPARATION FOR TRIAL.

09/29/87 WWP 0.80 92.00
OUTLINE REMAINING TASKS; TELEPHONE CONFERENCE WITH COURT.

09/30/87 MJC 0.30 13.50
PREPARATION FOR PRETRIAL CONFERENCE.

10/01/87 MJC 0.30 13.50
FILE MAINTENANCE.

10/05/87 WWP 2.00 230.00
REVIEW EXPERT STATUS; LIST ALL OUTSTANDING MOTIONS; REVIEW CITY'S REQUEST FOR RECONSIDERATION AND ORAL ARGUMENT.

10/05/87 RNB 0.50 35.00
REVIEW AND ANALYSIS OF CITY'S REQUEST FOR RECONSIDERATION AND ORAL ARGUMENT AND IN THE ALTERNATIVE FOR CERTIFICATION PURSUANT TO 28 U.S.C. SECTION 1292 (B); LEGAL RESEARCH ON APPEALS FROM INTERLOCUTORY DECISIONS.

10/06/87 WWP 3.50 402.50
PREPARE FOR AND ATTEND STATUS CONFERENCE.

10/06/87 RNB 3.50 245.00
PREPARATION FOR STATUS CONFERENCE; ANALYSIS OF DISCOVERY MATTERS AND

AMENDING COMPLAINT FOR VIOLATING LATEST ASSURANCE OF DISCONTINUANCE REGARDING RESOURCE RECOVERY FACILITY PROVISION; DRAFT MOTION FOR SEPARATE TRIALS AND SUPPORTING MEMORANDUM; ATTEND STATUS CONFERENCE.

10/06/87 MJC 0.80 36.00
PREPARATION FOR STATUS CONFERENCE; TRIAL PREPARATION.

10/07/87 MJC 0.20 9.00
ASSIGNMENT REGARDING DISCOVERY UPDATE.

10/12/87 WWP 0.50 57.50
ANALYZE MAGISTRATE'S RULINGS.

10/13/87 RNB 0.40 28.00
LEGAL RESEARCH ON SUBSTITUTION OF PARTIES UNDER F.R.C.P. 25(A).

10/14/87 WWP 3.40 391.00
CONFERENCE WITH MRS. DAGUE; RESEARCH MOOTNESS ISSUE; ANALYZE SUBSTITUTION OF PARTIES UNDER RULE 25.

10/15/87 WWP 1.50 172.50
TELEPHONE CONFERENCE WITH CLIENT; OUTLINE ALL ASPECTS OF CASE FOR DISCOVERY, TRIAL PREPARATION AND SETTLEMENT.

10/15/87 RNB 0.50 35.00
ANALYSIS OF AND PLAN FOR FURTHER DISCOVERY AND INVESTIGATION, SUBSTITUTION OF PARTY, LEGAL RESEARCH UPDATE AND PREPARATION FOR SUBMITTAL OF PROPOSED FINDINGS OF FACT.

10/15/87 MJC 0.60 27.00
PLAN DISCOVERY STATUS OF CASE FROM PRE-TRIAL HEARING.

10/16/87 WWP 1.00 115.00
OULTINE [SIC] CASE STRATEGY IN VIEW OF MAGISTRATE'S DISCOVERY ORDER.

10/16/87 MJC 0.20 9.00
REVIEW WORK TO BE DONE.

10/19/87 WWP 2.00 230.00
TELEPHONE CONFERENCE WITH MRS. DAGUE; CONFERENCE WITH MS. DAGUE; REVIEW TERMS OF DEMAND LETTER.

10/19/87 RNB 3.30 231.00
LEGAL RESEARCH UPDATE UNDER RCRA AND CWA; LEGAL RESEARCH ON MINIMUM REQUIREMENTS FOR RESOURCE RECOVERY FACILITIES UNDER RCRA.

10/19/87 MJC 2.80 126.00
DRAFT SUPPLEMENTAL INTERROGATORIES AND REQUESTS TO PRODUCE; REVIEW DISCOVERY FILE.

10/20/87 WWP 1.50 172.50
EDIT DEMAND LETTER; PLAN WORK ASSIGNMENTS FOR NEXT WEEK.

10/20/87 RNB 0.70 49.00
TELEPHONE CONFERENCE WITH ATTORNEY BOWLES REGARDING OCTOBER 6, 1987 STATUS CONFERENCE BEFORE MAGISTRATE NIEDERMEIER; ANALYSIS OF PROPOSED DEMAND FOR SETTLEMENT, CITY'S OFFER TO PROVIDE MR. DAGUE WITH TOPSOIL, SUPPLEMENTAL DISCOVERY REQUESTS AND PROPOSED FINDINGS OF FACT.

10/20/87 MJC 1.40 63.00
REVISE SUPPLEMENTAL DISCOVERY REQUESTS; REVIEW DEMAND LETTER TO CITY.

10/21/87 RNB 0.90 63.00
DRAFT REVISIONS TO AND ANALYSIS OF DEMAND LETTER; LEGAL RESEARCH ON APPLICABILITY OF MINIMUM FEDERAL REQUIREMENTS OF RCRA WHEN STATE HAS AN APPROVED EPA HAZARDOUS WASTE PROGRAM.

10/21/87 MJC 1.70 76.50
DRAFT PROPOSED FACTS FOR TRIAL.

10/22/87 WWP 1.50 172.50
ANALYZE TECHNIQUES FOR EXAMINING CITY'S EXPERT WITNESSES; EVALUATE EVIDENCE NEEDED TO PROVE GROUNDWATER CONTAMINATION.

10/23/87 WWP 1.00 115.00
FURTHER EVALUATE CITY'S EXPERTS' TESTIMONY, INCLUDING IMPACT ON WETLANDS AND METHANE GAS MIGRATION.

10/23/87 RNB 0.70 49.00
REVIEW AND ANALYSIS OF GENERAL ELECTRIC'S MEMORANDUM IN OPPOSITION TO CITY'S MOTION FOR RECONSIDERATION OR INTERLOCUTORY APPEAL; TELEPHONE CONFERENCE WITH ATTORNEY CAIN REGARDING SAME.

10/26/87 WWP 0.30 34.50
REVIEW MEMORANDUM IN OPPOSITION TO CITY'S MOTION FOR RECONSIDERATION; ANALYZE RESULTS.

10/26/87 MJC 1.00 45.00
REVISE PROPOSED FACTS FOR TRIAL.

10/27/87 WWP 2.80 322.00
REVIEW SUPPLEMENTAL DISCOVERY REQEUSTS [SIC]; REVIEW PROPOSED FINDINGS OF FACT.

10/27/87 MJC 3.60 162.00
REVIEW CITY'S VIOLATIONS OF ASSURANCE OF DISCONTINUANCE; REVIEW CHITTENDEN COURT FILE FOR CITY-STATE LITIGATION; COMPLETE FOURTH SET OF INTERROGATORIES AND REQUESTS TO PRODUCE TO CITY; TRIAL PREPARATION.

10/28/87 WWP 3.00 345.00
ANALYZE ASSURANCE OF DISCONTINUANCE PROBLEMS; LEGAL RESEARCH ON RESOURCE RECOVERY FACILITIES.

10/28/87 RNB 1.10 77.00
ANALYSIS OF FEDERAL GUIDELINES FOR RESOURCE RECOVERY FACILITIES AND OF CITY'S COMPLIANCE, OR LACK THEREOF, WITH THE THIRD ASSURANCE OF DISCONTINUANCE.

10/28/87 MJC 0.20 9.00
LETTER TO CLERK FOR COURT DOCUMENTS.

10/29/87 WWP 1.20 138.00
REVIEW HAGAR MEMORANDUM IN OPPOSITION TO RECONSIDERATION; REVIEW JUDGE BILLINGS' ORDER; FURTHER ANALYSIS OF ASSURANCE OF DISCONTINUANCE COMPLIANCE; REVISE AHERN LETTER.

10/29/87 RNB 0.50 35.00
REVIEW OF WHITING COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO CITY'S MOTION FOR RECONSIDERATION OR

INTERLOCUTORY APPEAL AND COURT'S ORDER DENYING CITY'S MOTION.

10/29/87 MJC 1.20 54.00
LETTER TO BILL AHEARN REQUESTING CITY CORRESPONDENCE; TELEPHONE CONFERENCE WITH AHEARN TO SCHEDULE VANR FILE REVIEW.

10/30/87 WWP 0.50 57.50
FURTHER REVIEW OF CITY'S COMPLIANCE WITH ASSURANCE OF DISCONTINUANCE; LIST ADDITIONAL DATA TO OBTAIN FROM STATE.

11/02/87 WWP 0.50 57.50
REVIEW PROPOSED FINDINGS AND STATUS OF SETTLEMENT.

11/02/87 RNB 0.60 42.00
ANALYSIS OF AMENDMENT TO THIRD ASSURANCE OF DISCONTINUANCE AND FEDERAL REGULATIONS FOR CLOSURE OF OPEN DUMPS.

11/02/87 MJC 4.20 189.00
REVIEW VANR FILES ON LANDFILL; CONFERENCE WITH AHEARN REGARDING SAME; ANALYSIS OF CITY'S COMPLIANCE WITH CLOSE-OUT PLAN.

11/03/87 WWP 0.30 34.50
TELEPHONE CONFERENCE WITH MRS. DAGUE.

11/04/87 RNB 0.50 35.00
CONFERENCE WITH MR. BESSETTE TO DISCUSS STATUS OF CASE AND SETTLEMENT DEMAND TO CITY FOR PENDENT STATE CLAIMS.

11/06/87 WWP 0.50 57.50
CONFERENCE WITH MS. DAGUE.

11/16/87 RNB 0.20 14.00
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING ANTICIPATED TRIAL DATE AND NECESSITY FOR TESTIMONY OF REPRESENTATIVE OF EDLUND COMPANY AT TRIAL.

11/20/87 RNB 0.40 28.00
STATUS REVIEW OF OUTSTANDING DISCOVERY.

11/30/87 WWP 0.70 80.50
REVIEW STATUS; TELEPHONE CONFERENCE WITH MR. MCKEARIN.

11/30/87 RNB 0.80 56.00
STATUS REVIEW OF MATTER, INCLUDING DEMAND LETTER AND OUTSTANDING DISCOVERY, AND NECESSITY TO MOVE FOR A SUBSTITUTION OF PARTIES; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SETTLEMENT DEMAND.

12/01/87 WWP 1.00 115.00
ANALYZE LACK OF RESPONSE FROM CITY; REVIEW AHERN LETTER.

12/07/87 WWP 0.50 57.50
ANALYZE CITY'S RESPONSE OR LACK THEREOF; REVIEW PARK PLANS AT LANDFILL.

12/07/87 MJC 0.50 22.50
REVIEW STATUS OF FACT WORK TO BE DONE.

12/08/87 WWP 1.00 115.00
DRAFT AND EDIT LETTER TO MAGISTRATE.

12/08/87 RNB 0.30 21.00
REVIEW AND EDIT LETTER TO MAGISTRATE NIEDERMIER.

12/08/87 MJC 0.20 9.00
TELEPHONE CONFERENCE WITH VANR REGARDING TEMPORARY OPERATING AUTHORITY FOR BURLINGTON LANDFILL.

12/11/87 WWP 0.60 69.00
REVIEW HEARING NOTICES; REVIEW STATUS ON DISCOVERY.

12/15/87 MJC 0.30 13.50
TELEPHONE CONFERENCE WITH US EPA FOR PUBLICATION ON RRFS.

12/16/87 WWP 0.80 92.00
ORGANIZE MATERIALS FOR TOMORROW'S HEARING.

12/16/87 MJC 0.50 22.50
PREPARATION FOR STATUS-SETTLEMENT HEARING.

12/17/87 WWP 3.70 425.50
REVIEW ALL ISSUES FOR CONFERENCE WITH MAGISTRATE; TELEPHONE CONFERENCES WITH MRS. DAGUE; CONFERENCE WITH MAGISTRATE AND MR. CLAPP; REVIEW COURT DECISION ON MODIFICATION; TELEPHONE CONFERENCE WITH MAGISTRATE; TELEPHONE CONFERENCES WITH MR. CLAPP.

12/17/87 RNB 3.70 259.00
ANALYSIS OF PROCEDURAL HISTORY AND DISCOVERY TO DATE, AND THE 1-31-85 ASSURANCE OF DISCONTINUANCE AND AMENDMENT THERETO IN PREPARATION FOR STATUS - SETTLEMENT CONFERENCE BEFORE MAGISTRATE NIEDERMIER; ATTEND SAME.

12/17/87 MJC 3.80 171.00
PREPARATION FOR HEARING-SETTLEMENT CONFERENCE; REVIEW STATE DOCUMENTS FOR AUTHORITY TO OPERATE WASTE FACILITY; TELEPHONE CONFERENCE WITH VANR REGARDING SAME.

12/21/87 WWP 0.30 34.50
LIST INVESTIGATION LEADS.

12/21/87 MJC 0.80 36.00
ANALYSIS OF FACT INVESTIGATION WITH FORMER CITY EMPLOYEES; FILE MAINTENANCE.

12/22/87 WWP 0.50 57.50
ANALYZE SUBSTITUTION OF PARTIES AND ESTATE PLAN.

12/28/87 WWP 1.00 115.00
REVIEW CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE; TELEPHONE CONFERENCE WITH MRS. DAGUE; REVIEW PARTY SUBSTITUTION STATUS.

12/28/87 MJC 0.20 9.00
COPY AND ROUTE SOLID WASTE NEWS RELATING TO CITY.

12/29/87 RNB 0.30 21.00
REVIEW AND ANALYZE CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE.

12/30/87 WWP 0.40 46.00
REVIEW TOXIC CONSTITUENTS LISTED BY STATE WITH QUANTITATIVE STANDARDS.

12/31/87 WWP 1.00 115.00
REVIEW AND ANALYZE CITY RESPONSE TO SETTLEMENT DEMAND AND REQUEST FOR EXTENSION TO ANSWER INTERROGATORIES.

12/31/87 RNB 3.00 210.00
REVIEW AND ANALYSIS OF CITY'S RESPONSE TO PLAINTIFFS' DEMAND FOR SETTLEMENT AND CITY'S MOTION TO EXTEND TIME TO RESPOND TO PLAINTIFFS' INTERROGATORIES AND REQUESTS TO PRODUCE; LEGAL RESEARCH ON AWARDS OF ATTORNEYS FEES.

01/05/88 RNB 1.70 119.00
DRAFT MOTION FOR SUBSTITUTION AS PLAINTIFF BY ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, PROPOSED ORDER AND NOTICE OF HEARING.

01/05/88 MJC 0.80 36.00
REVIEW INTERROGATORIES FROM DEFENDANT; REVIEW CORRESPONDENCE REGARDING SETTLEMENT; MEMORANDUM TO ATTORNEY BLAND REGARDING DISCOVERY RESPONSES; DRAFT RESPONSES TO INTERROGATORIES AND REQUESTS TO PRODUCE.

01/07/88 MJC 0.30 13.50
REVIEW DISCOVERY RESPONSES.

01/08/88 WWP 1.50 172.50
REVIEW SETTLEMENT RESPONSE OPTIONS; LEGAL RESEARCH ON ATTORNEYS FEES.

01/08/88 RNB 1.30 91.00
ANALYSIS OF ATTORNEY CLAPP'S RESPONSE TO SETTLEMENT DEMAND; LEGAL RESEARCH ON RECOVERY OF PUNITIVE DAMAGES AGAINST A MUNICIPALITY UNDER VERMONT LAW.

01/11/88 WWP 1.00 115.00
REVIEW CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE.

01/11/88 RNB 0.70 49.00
TELEPHONE CONFERENCE WITH ATTORNEY CULLEN REGARDING STATUS OF LAWSUIT AND EXPECTED TRIAL DATE; ANALYSIS OF OUTSTANDING DISCOVERY MATTERS, CITY'S RESPONSE TO SETTLEMENT DEMAND, AMENDING THE COMPLAINT, EVIDENCE TO SUPPORT EACH COUNT OF THE COMPLAINT, AND WHETHER PUNITIVE DAMAGES ARE RECOVERABLE AGAINST A MUNICIPALITY UNDER VERMONT LAW.

01/11/88 MJC 0.30 13.50
REVIEW STATUS OF DISCOVERY.

01/12/88 WWP 0.20 23.00
TELEPHONE CONFERENCE WITH MR. DAGUE.

01/13/88 RNB 0.70 49.00
LEGAL RESEARCH ON RECENT JURISPRUDENCE ON AWARD OF ATTORNEYS FEES UNDER CWA.

01/13/88 MJC 0.30 13.50
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING DOCUMENTS TO BE PRODUCED.

01/14/88 WWP 3.20 368.00
REVIEW STATUS; CONFERENCE WITH MR. BESSETTE; CONFERENCE WITH MR. DAGUE AND MRS. DAGUE; DOCUMENT REVIEW AT ATTORNEY CLAPP'S OFFICE.

01/14/88 RNB 4.30 301.00
INSPECTION OF CITY'S FILES IN RESPONSE TO SUPPLEMENTAL INTERROGATORIES AND REQUESTS TO PRODUCE; CONFERENCE WITH ERNIE DAGUE, SR. AND BETTY

DAGUE TO DISCUSS STATUS OF CASE AND RESPONSE TO CITY'S SETTLEMENT OFFER.

01/14/88 MJC 3.50 157.50
FILE REVIEW AT ATTORNEYS CLAPP'S OFFICE.

01/19/88 RNB 1.30 91.00
INITIAL DRAFT OF AMENDED COMPLAINT, MOTION TO AMEND COMPLAINT AND SUPPORTING MEMORANDUM.

01/26/88 WWP 1.00 115.00
REVIEW MOTION TO AMEND; REVIEW STATUS OF CITY DOCUMENT REQUEST.

01/26/88 RNB 0.40 28.00
DRAFT REVISIONS TO AMENDED COMPLAINT AND MOTION TO AMEND COMPLAINT.

01/28/88 WWP 3.00 345.00
REVIEW DISCOVERY; REVIEW AND EDIT MOTION TO AMEND AND MEMORANDUM; OUTLINE MOTION AND SUPPORTING MEMORANDUM FOR PARTIAL SUMMARY JUDGMENT; REVIEW CITY'S ADMISSIONS; OUTLINE RESPONSE TO CITY OFFER LETTER; CHECK STATUS ON RRF REGULATIONS.

01/28/88 RNB 2.50 175.00
ANALYSIS OF DISCOVERY AND PLAN FURTHER INVESTIGATION; ANALYZE AMENDED COMPLAINT AND NECESSITY FOR MOVING FOR PARTIAL SUMMARY JUDGMENT, RESPONSE TO CITY'S SETTLEMENT OFFER, AND TRIAL STRATEGY; REVIEW OF PLEADINGS IN STATE OF VERMONT V. CITY OF BURLINGTON LAWSUIT; REVIEW NEWSPAPER ARTICLES FOR STATEMENTS MADE BY CITY EMPLOYEES

REGARDING THE LANDFILL; REVIEW AND ANALYSIS OF CITY'S RESPONSES TO REQUESTS FOR ADMISSION IN PREPARATION FOR MOVING FOR PARTIAL SUMMARY JUDGMENT.

01/28/88 MJC 3.80 171.00
PREPARATION FOR FILING MOTION FOR PARTIAL SUMMARY JUDGMENT TO CLOSE LANDFILL; REVIEW COURT FILES REGARDING AMENDMENTS TO ASSURANCE OF DISCONTINUANCE, LEGAL MEMORANDA REGARDING CIVIL-CRIMINAL PENALTIES; REVIEW NEWS FILES REGARDING REPRESENTATIONS BY CITY REGARDING LANDFILLING AT NEW SITE; REVIEW CITY RECORDS REGARDING SAME.

01/29/88 MJC 0.50 22.50
TELEPHONE CONFERENCE WITH CHITTENDEN COURT REGARDING AMENDMENTS TO ASSURANCE OF DISCONTINUANCE; TELEPHONE CONFERENCE WITH EPA FOR RRF PUBLICATIONS.

01/30/88 RNB 2.50 175.00
REVIEW AND ANALYZE PLEADINGS, MEMORANDA IN SUPPORT OF AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION, MAGISTRATE'S REPORT AND RECOMMENDATION AND OPINION AND ORDER OF JUDGE BILLINGS IN PREPARATION FOR MOVING FOR PARTIAL SUMMARY JUDGMENT.

02/01/88 WWP 2.70 310.50
ANALYZE ISSUES UNDER 42 USC SECTION 6945 FOR BASIS OF SUMMARY JUDGMENT MOTION; EVALUATE CITY'S LIKELY CONTENTION OF ASSURANCE COMPLIANCE;

ANALYZE CITY'S OFFER REGARDING ATTORNEYS FEES.

02/01/88 RNB 2.50 175.00
ANALYSIS OF 42 U.S.C. SECTION 6945(A); BEGIN DRAFTING MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW.

02/01/88 MJC 1.50 67.50
REVIEW AND ANALYZE RESOURCE RECOVERY INFORMATION PUBLISHED BY US GOVERNMENT.

02/02/88 WWP 0.60 69.00
TELEPHONE CONFERENCE WITH MR. JARVIS; REVIEW HEARING NOTES.

02/02/88 RNB 1.80 126.00
CONTINUE DRAFTING MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; REVIEW NOTES OF 12-17-87 STATUS CONFERENCE BEFORE MAGISTRATE NIEDERMEIR.

02/03/88 WWP 2.00 230.00
ANALYZE AND EDIT MOTION FOR PARTIAL SUMMARY JUDGMENT; ANALYZE CONTENTS OF RESPONSE LETTER.

02/03/88 WWP 0.30 34.50
REVIEW STATUS OF FACT INVESTIGATION.

02/03/88 RNB 2.30 161.00
ANALYSIS OF CITY'S EFFORTS OF RESOURCE RECOVERY AND ITS PURSUITS OF LONG TERM DISPOSAL OPTIONS UNDER THE JANUARY 31, 1985 ASSURANCE OF DISCONTINUANCE; FURTHER ANALYSIS OF ARGUMENTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; REVISE MEMORANDUM OF LAW IN SUPPORT OF

MOTION FOR PARTIAL SUMMARY JUDGMENT.

02/03/88 MJC 1.00 45.00
ANALYSIS OF FACTUAL BASIS FOR MOTION FOR PARTIAL SUMMARY JUDGMENT; INVESTIGATION ASSIGNMENT REGARDING SAME.

02/04/88 WWP 0.40 46.00
REVIEW MATTERS TO BE RAISED WITH MAGISTRATE.

02/04/88 MJC 1.00 45.00
TELEPHONE CONFERENCE WITH EPA REGARDING OPEN DUMP INVENTORY; COPY DOCUMENTS REFERRED TO IN VANR LETTER; ROUTE TO ATTORNEY PEARSON.

02/05/88 MJC 0.50 22.50
TELEPHONE CONFERENCE WITH GOODKIND REGARDING COMBINED SEWER OVERFLOW STUDY; TELEPHONE CONFERENCE WITH EPA REGARDING INVENTORY OF OPEN DUMPS.

02/08/88 WWP 1.50 172.50
ANALYZE CITY'S RECYCLING PROGRAM; TELEPHONE CONFERENCE WITH MR. CLAPP; REVIEW COURT HEARING ORDER.

02/08/88 RNB 1.00 70.00
ANALYSIS OF CITY'S RECYCLING PROGRAM UNDER THE JANUARY 31, 1985 ASSURANCE OF DISCONTINUANCE AND THE SEPTEMBER 1, 1987 AMENDMENT THERETO; ANALYZE RESPONSE TO CITY'S OFFER OF SETTLEMENT AND INTERROGATORIES AND REQUESTS TO PRODUCE AND TO FILING MOTION TO AMEND COMPLAINT, AMENDED COMPLAINT AND MOTION FOR PARTIAL SUMMARY JUDGMENT.

02-09-88 WWP 1.50 172.50
REVIEW EPA WETLAND PROTECTION FOR BURLINGTON INTERVALE; REVIEW PENDING MOTIONS; LETTER TO MR. CLAPP.

02-09-88 RNB 0.90 63.00
ANALYSIS OF PLAINTIFF RESPONSE TO THE CITY'S OFFER; REVIEW, ANALYSIS AND EDIT LETTER TO ATTORNEY CLAPP.

02-09-88 MJC 0.30 13.50
REVIEW EPA NEWS REGARDING INTERVALE; TELEPHONE CONFERENCE WITH EPA REGARDING OPEN DUMP INVENTORY; STATUS CONFERENCE REGARDING UPCOMING HEARING ON MOTIONS.

02-10-88 WWP 4.20 483.00
PREPARE FOR AND ATTEND STATUS CONFERENCE; TWO TELEPHONE CONFERENCES WITH CLIENT; CONFERENCE WITH CLIENTS.

02-10-88 RNB 5.30 371.00
PREPARATION FOR AND ATTEND PRE-TRIAL CONFERENCE AND HEARING ON MOTIONS FOR SUBSTITUTION AND TO EXTEND TIME; SERVICE AND FILING OF MOTION FOR PARTIAL SUMMARY JUDGMENT, MOTION TO AMEND COMPLAINT AND AMENDED COMPLAINT; REVIEW AND ANALYSIS OF CITY'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM; MEMORANDUM TO FILE; CONFERENCE WITH MR. DAGUE AND MRS. DAGUE REGARDING PRETRIAL CONFERENCE AND SETTLEMENT.

02-10-88 MJC 1.40 63.00
PREPARATION FOR HEARING; INDEX PLEADINGS; REVIEW MOTION FOR PARTIAL SUMMARY JUDGMENT.

02-11-88 WWP 0.30 34.50
TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE.

02-12-88 RNB 0.30 21.00
LEGAL RESEARCH OF U.S. SUPREME COURT'S RULING IN GWALTNEY CASE IN PREPARATION FOR RESPONDING TO CITY'S MOTION FOR SUMMARY JUDGMENT.

02-12-88 MJC 0.30 13.50
TELEPHONE CONFERENCE WITH EPA, REGARDING LIST OF OPEN DUMPS; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

02-16-88 MJC 0.20 9.00
REVIEW NEWS REPORTS ON CITY RECYCLING EFFORTS.

02-17-88 WWP 0.60 69.00
TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE; REVIEW EPA INFORMATION REQUESTS.

02-17-88 RNB 0.40 28.00
ANALYSIS OF RESPONDING TO CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE AND CITY'S MOTION FOR SUMMARY JUDGMENT, AND PREPARATION FOR FINAL PRE-TRIAL ORDER.

02-18-88 MJC 0.20 9.00
REVISE INFORMATION REQUEST; LETTER TO EPA.

02-25-88 WWP 1.80 207.00
REVIEW DOCUMENTS FROM FEDERAL AND STATE AGENCIES; ORGANIZE PRE-TRIAL PREPARATION.

02-25-88 RNB 1.30 91.00
LEGAL RESEARCH ON LOCAL RULE 6 OF CIVIL PROCEDURE IN PREPARATION FOR PREPARING JOINT PRETRIAL CONFERENCE ORDER WITH STIPULATION OF FACTS; ANALYSIS OF RESPONSE TO CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE AND CITY'S MOTION FOR SUMMARY JUDGMENT; ANALYSIS OF SETTLEMENT POSTURE.

02-26-88 WWP 1.50 172.50
REVIEW PRETRIAL ORDER ELEMENTS; LETTER TO MR. CLAPP; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE.

02-26-88 RNB 2.30 161.00
DRAFT LETTER TO ATTORNEY CLAPP REGARDING JOINT PRE-TRIAL CONFERENCE ORDER; CURSORY REVIEW OF ENTIRE FILE AND COMPILATION AND ORGANIZATION OF DOCUMENTS IN PREPARATION FOR DRAFTING PROPOSED FINAL PRETRIAL ORDER.

02-27-88 RNB 10.80 756.00
BEGIN DRAFT OF PROPOSED FINAL PRETRIAL ORDER, INCLUDING STATEMENT OF NATURE OF CASE, AMENDMENT TO THE PLEADINGS, STIPULATIONS AS TO PROPER VENUE, JURISDICTION OF THE PARTIES AND SUBJECT MATTER, UNCONTESTED FACTS AND ADMISSION OF EXHIBITS, LAW GOVERNING THE CASE, AND AUTHENTICITY OF DOCUMENTS, ISSUES OF LAW AND LIST OF PLAINTIFFS' WITNESSES.

02-28-88 WWP 0.50 57.50
REVIEW PROGRESS ON PRETRIAL ORDER.

02-28-88 RNB 11.70 819.00
CONTINUE DRAFTING STIPULATION OF FACTS REGARDING FEDERAL CLAIMS, WITH SUPPORTING CITATIONS, FOR PROPOSED FINAL PRE-TRIAL ORDER.

02-29-88 WWP 0.80 92.00
TELEPHONE CONFERENCE WITH MR. CLAPP; STATUS REVIEW OF PRETRIAL ORDER.

02-29-88 RNB 3.30 231.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING CITY'S SETTLEMENT OFFER AND TO SCHEDULE EXCHANGES OF DRAFT FINAL PRE-TRIAL ORDERS; FINISH DRAFTING STIPULATION OF FACTS REGARDING FEDERAL CLAIMS FOR PROPOSED FINAL PRE-TRIAL ORDER; PREPARATION FOR DRAFTING STIPULATION OF FACTS REGARDING PENDENT STATE CLAIMS.

03-01-88 RNB 7.30 511.00
DRAFT ADDITIONAL STIPULATION OF FACTS REGARDING FEDERAL CLAIMS WITH SUPPORTING CITATIONS; DRAFT STIPULATION OF FACTS REGARDING PENDENT STATE CLAIMS WITH SUPPORTING CITATIONS, DOCUMENTATION AND EXHIBITS; REVIEW, EDIT AND PROOFREAD SAME.

03-01-88 MJC 2.80 126.00
REVIEW PROPOSED FACTS; PREPARE DOCUMENTS FOR FILING AS EXHIBITS IN SUPPORT OF FACTS; REVIEW FILE FOR FACT DOCUMENTS.

03-02-88 RNB 8.80 616.00
LETTER TO ATTORNEY CLAPP REGARDING PROPOSED FINAL PRETRIAL ORDER; DRAFT

ADDITIONAL STIPULATION OF FACTS REGARDING PENDENT STATE CLAIMS; COMPILATION OF DOCUMENTS FOR STIPULATION AS TO THEIR ADMISSION OR AUTHENTICITY; FINAL EDIT AND PROOFREAD OF PLAINTIFFS' PROPOSED FINAL PRETRIAL ORDER AND STIPULATION OF FACTS.

03-02-88 MJC 5.20 234.00
COMPILE DOCUMENTS FOR SUBMITTAL IN SUPPORT OF PROPOSED FACTS; REVIEW PROPOSED FACTS REGARDING STATE CLAIMS.

03-04-88 RNB 7.30 511.00
DRAFT SYNOPSIS OF PLAINTIFFS' CONTENTIONS AND THEORIES OF RECOVERY FOR PROPOSED FINAL PRE-TRIAL ORDER; DRAFT GENUINE ISSUES OF MATERIAL FACT SECTION OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

03-04-88 MJC 2.00 90.00
REVIEW FACT DOCUMENTS FOR PRE-TRIAL STIPULATION.

03-05-88 WWP 0.70 80.50
REVIEW INTERROGATORIES AND REQUESTS TO PRODUCE.

03-05-88 RNB 10.60 742.00
DRAFT ARGUMENTS REFUTING APPLICABILITY OF MOOTNESS DOCTRINE TO PLAINTIFFS' CLAIMS UNDER RCRA AND THE CWA FOR PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; ANALYSIS OF AND REVISE PLAINTIFFS' MEMORANDUM

IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

03-06-88 WWP 3.50 402.50
REVIEW ANSWERS TO INTERROGATORIES AND REQUESTS TO PRODUCE; ANALYSIS OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT; REVIEW DRAFT PRE-TRIAL ORDER AND ATTACHMENTS.

03-06-88 RNB 7.00 490.00
LETTER TO CLERK OF U.S. DISTRICT COURT REGARDING PLAINTIFFS' LOCAL RULE STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; COMPILATION OF DOCUMENTS FOR STIPULATION AS TO AUTHENTICITY IN PREPARATION FOR CONFERENCE WITH ATTORNEY CLAPP REGARDING PROPOSED FINAL PRE-TRIAL ORDER; REVIEW PHOTOGRAPHS WHICH PLAINTIFFS INTEND TO OFFER AS EVIDENCE AT TRIAL; DRAFT PLAINTIFFS' RESPONSES TO CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE; FILE ORGANIZATION OF LEGAL RESEARCH.

03-06-88 MJC 2.50 112.50
COMPILE AND REVIEW FACT DOCUMENTS REGARDING STATE CLAIMS FOR PRE-TRIAL STIPULATION.

03-07-88 WWP 2.40 276.00
READ CITY'S PROPOSED PRE-TRIAL ORDER; TELEPHONE CONFERENCE WITH MR. DAGUE; REVIEW STATUS OF PRE-TRAIL ORDER; MEMORANDUM TO FILE.

03-07-88 RNB 2.40 168.00
FINAL EDIT AND PROOFREAD OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY

JUDGMENT; SERVICE AND FILING OF SAME; SERVICE AND FILING OF PLAINTIFFS' STATEMENT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING MEETING TO PREPARE JOINTLY PROPOSED FINAL PRETRIAL ORDER; SERVICE AND FILING OF PLAINTIFFS' RESPONSES TO DEFENDANT'S INTERROGATORIES AND REQUESTS TO PRODUCE; REVIEW AND ANALYSIS OF DEFENDANT'S PROPOSED FINAL PRETRIAL ORDER; PREPARATION FOR COUNSEL'S CONFERENCE REGARDING PROPOSED FINAL PRETRIAL ORDER.

03-07-88 MJC 2.00 90.00
DRAFT RESPONSES TO REQUESTS TO PRODUCE; PREPARATION FOR CONFERENCE ON STIPULATED FACTS.

03-08-88 WWP 4.40 506.00
PREPARE FOR CONFERENCE WITH MR. CLAPP; CONFERENCE WITH MR. CLAPP AND MR. MCKEARIN AT DINSE, ERDMANN AND CLAPP; TELEPHONE CONFERENCES WITH COURT; TELEPHONE CONFERENCE WITH DR. REED.

03-08-88 RNB 9.60 672.00
COMPILATION AND REVIEW OF DOCUMENTS, MAPS AND PHOTOGRAPHS FOR STIPULATION AS TO ADMISSIBILITY OR AS TO AUTHENTICITY; PREPARATION FOR AND ATTEND COUNSELS' CONFERENCE REGARDING PROPOSED FINAL PRETRIAL ORDER; TELEPHONE CONFERENCE WITH

ATTORNEY CLAPP REGARDING STIPULATION OF DOCUMENTS; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING EXHIBITS PREVIOUSLY ADMITTED; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING SAME; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING STIPULATION OF FACTS; DRAFT REVISIONS TO PROPOSED FINAL PRETRIAL ORDER; LEGAL RESEARCH ON EVIDENCE ADMITTED DURING PRELIMINARY INJUNCTION HEARING.

03-08-88 MJC 7.40 333.00
PREPARATION FOR CONFERENCE WITH OPPOSING COUNSEL TO STIPULATE FACTS AND DOCUMENTS.

03-09-88 WWP 5.50 632.50
REVIEW PRE-TRIAL ORDER WITH ATTORNEY CLAPP INCLUDING ORDER, STIPULATION OF FACTS, CONCLUSIONS OF LAW AND EXHIBITS.

03-09-88 RNB 9.30 651.00
PREPARATION FOR AND ATTEND CONTINUATION OF COUNSELS' CONFERENCE ON PROPOSED FINAL PRETRIAL ORDER; REVISE PROPOSED FINAL PRETRIAL ORDER, INCLUDING STIPULATION OF FACTS AND ISSUES OF FACT SECTIONS, IN LIGHT OF COUNSELS' CONFERENCE; REVIEW WITH ATTORNEY CLAPP; ANALYSIS OF PROPOSED FINAL PRETRIAL ORDER.

03-09-88 MJC 1.20 54.00
PREPARATION FOR MEETING WITH OPPOSITE COUNSEL TO STIPULATE FACTS AND

DOCUMENTS; MEETING WITH ATTORNEY CLAPP ON PROPOSED PRE-TRIAL ORDER.

03-23-88 RNB 1.00 70.00
ANALYSIS OF CITY'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION THERETO, AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND STIPULATION OF FACTS IN PROPOSED FINAL PRE-TRIAL ORDER IN PREPARATION FOR HEARING.

03-25-88 RNB 0.80 56.00
REVIEW AND ANALYSIS OF DEFENDANT'S STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND ACCOMPANYING AFFIDAVIT OF JONATHAN LASH IN PREPARATION FOR HEARING ON MOTIONS FOR SUMMARY JUDGMENT.

03-28-88 WWP 3.50 402.50
PREPARE FOR AND ATTEND HEARING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

03-28-88 RNB 5.20 364.00
DRAFT LIST OF ISSUES OF FACT SUBJECT TO CITY'S CONFIRMATION AND ISSUES OF FACT FOR RESOLUTION BY THE COURT; ANALYSIS OF SAME; PREPARATION FOR AND ATTEND HEARING ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

03-29-88 WWP 0.50 57.50
READ CITY ANNUAL REPORT.

03-29-88 MJC 0.30 13.50
REVIEW CITY DISCLOSURES OF LANDFILLING LITIGATION IN ANNUAL REPORT.

04-06-88 RNB 0.50 35.00
REVIEW AND ANALYSIS OF CITY'S 1987 ANNUAL REPORT.

04-12-88 MJC 0.50 22.50
FILE MAINTENANCE.

04-15-88 WWP 0.20 23.00
CHECK ON CITY RESPONSE TO DISCOVERY CONFIRMATIONS.

04-15-88 RNB 0.40 28.00
DRAFT LETTER TO ATTORNEY CLAPP REGARDING ISSUES OF FACT SUBJECT TO HIS CONFIRMATION AND STIPULATION OF DOCUMENTS AS TO THEIR ADMISSION OR AUTHENTICITY.

04-18-88 WWP 0.60 69.00
ARRANGE FOR PROF. REED PAYMENT; REVIEW AND ANALYZE CITY'S MOTION FOR SEPARATE TRIALS.

04-18-88 RNB 0.70 49.00
REVIEW AND ANALYSIS OF CITY'S MOTION FOR SEPARATE TRIALS AND MEMORANDUM OF LAW.

04-19-88 RNB 2.10 147.00
INITIAL DRAFT OF MEMORANDUM IN OPPOSITION TO MOTION FOR SEPARATE TRIALS; REVISE SAME.

04-20-88 WWP 0.50 57.50
REVIEW AND ANALYZE MAGISTRATE'S DECISION.

04-20-88 RNB 0.60 42.00
REVIEW AND ANALYSIS OF THE MAGISTRATE'S REPORT AND RECOMMENDATION ON THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT.

04-20-88 MJC 1.20 54.00
TELEPHONE CONFERENCE WITH COURT FOR TAPE OF TESTIMONY; REVIEW TAPES OF DAGUE AND OGDEN TESTIMONY; MEMO TO ATTORNEY BLAND REGARDING SAME; TELEPHONE CONFERENCE WITH EPA, FEDERAL INFORMATION SERVICE, FOR RCRA INVENTORY OF OPEN DUMPS.

04-21-88 MJC 0.30 13.50
TELEPHONE CONFERENCE WITH RCRA HOTLINE FOR OPEN DUMP INVENTORY.

04-25-88 WWP 0.80 92.00
REVIEW AND ANALYZE ATTORNEY FEE PROVISION UNDER RCRA.

04-26-88 RNB 0.20 14.00
SERVICE AND FILING OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR SEPARATE TRIALS.

04-27-88 MJC 0.20 9.00
REVIEW NEWS REGARDING COMPOSTING PROJECT.

04-28-88 RNB 0.30 21.00
REVIEW TRANSCRIPT OF ERNEST DAGUE, JR.'S TESTIMONY AT HEARING FOR PRELIMINARY INJUNCTION.

04-28-88 MJC 1.00 45.00
FURTHER REVIEW OF ERNEST DAGUE, JR.'S TESTIMONY.

05-03-88 RNB 2.70 189.00
LEGAL RESEARCH ON FEDERAL ENVIRONMENTAL STATUTORY REMEDIES.

05-09-88 WWP 0.30 34.50
REVIEW TRESPASS PROBLEM AT CLIENT'S PROPERTY.

05-10-88 RNB 0.30 21.00
TELEPHONE CONFERENCE WITH MR. DAGUE REGARDING CITY'S TRESPASS ON HIS PROPERTY.

05-19-88 RNB 0.30 21.00
ASSIGNMENTS TO LEGAL ASSISTANT CASE REGARDING CITY'S TRESPASS ON ERNIE DAGUE, SR.'S PROPERTY AND TRANSCRIPTION OF JAMES OGDEN'S TESTIMONY DURING PRELIMINARY INJUNCTION HEARING IN PREPARATION FOR TRIAL.

05-19-88 MJC 0.50 22.50
ANALYSIS OF NEW FACT ISSUES REGARDING TRESPASS BY CITY; DETERMINATION OF SCOPE OF OGDEN TESTIMONY NEEDED AT TRIAL.

05-20-88 WWP 0.50 57.50
ANALYZE COURT'S GRANTING SEPARATE TRIAL MOTION.

05-20-88 RNB 0.50 35.00
REVIEW AND ANALYSIS OF JUDGE BILLINGS' ORDER REGARDING DEFENDANT'S MOTION FOR SEPARATE TRIALS.

05-23-88 MJC 1.00 45.00
EDIT PARTIAL TRANSCRIPT OF OGDEN TESTIMONY; REVIEW COURT LOG AND ORDER COMPLETE OGDEN TESTIMONY TRANSCRIPT.

05-26-88 WWP 0.20 23.00
READ PRE-TRIAL CONFERENCE ORDER.

05-31-88 WWP 2.00 230.00
TELEPHONE CONFERENCE WITH COURT; REVIEW WITNESS AVAILABILITY, PREPARE FOR TRIAL; OUTLINE TASKS; REVIEW TAPE TRANSCRIPTIONS; ARRANGE FOR MEETING WITH CLIENT.

06-01-88 WWP 1.00 115.00
REVIEW TRIAL PREPARATION OUTLINE, TRANSCRIPT PREPARATION, LEGAL RESEARCH UPDATE AND DOCUMENTS.

06-01-88 RNB 0.20 14.00
ASSIGNMENT TO LEGAL ASSISTANT CASE REGARDING THE TRANSCRIPTION OF TESTIMONY OF ERNEST DAGUE, JR. AND JAMES OGDEN IN PREPARATION FOR TRIAL.

06-01-88 MJC 0.40 18.00
ARRANGE FOR TRANSCRIPTION OF DAGUE AND OGDEN TESTIMONY.

06-06-88 MJC 0.50 22.50
PREPARATION FOR PRE-TRIAL CONFERENCE AND CLIENT INTERVIEW.

06-07-88 WWP 0.20 23.00
REVIEW CHANGE IN HEARING DATE.

06-07-88 RNB 0.30 21.00
LEGAL RESEARCH ON RECOVERABILITY OF PENALTIES FOR PAST CLEAN WATER ACT VIOLATION IN CITIZEN SUITS.

06-07-88 MJC 4.20 189.00
REVIEW AND EDIT DAGUE AND OGDEN TRANSCRIPTS; TELEPHONE CONFERENCE WITH CLIENT TO SCHEDULE PRETRIAL MEETING.

06-08-88 MJC 1.00 45.00
EDIT TRANSCRIPT OF OGDEN AND DAGUE TESTIMONY.

06-13-88 MJC 0.30 13.50
TWO TELEPHONE CONFERENCES WITH CLIENT TO SCHEDULE PRE-TRIAL CONFERENCE MEETING.

06-22-88 RNB 0.80 56.00
MEMORANDUM TO ATTORNEY PEARSON REGARDING PRE-TRIAL CONFERENCE; COMPILE DOCUMENTS FOR PRE-TRIAL CONFERENCE.

06-23-88 WWP 1.00 115.00
CONFERENCE WITH CLIENTS.

06-23-88 RNB 1.70 119.00
PREPARATION FOR AND CONFERENCE WITH ERNIE DAGUE, SR. AND BETTY DAGUE REGARDING PRE-TRIAL CONFERENCE, SEVERANCE OF FEDERAL CLAIMS AND PENDENT STATE CLAIMS AND SETTLEMENT.

07-01-88 WWP 2.00 230.00
TELEPHONE CONFERENCE WITH COURT; REVIEW PRE-TRIAL CORRESPONDENCE WITH CITY; REVIEW TASK LIST TO BE COMPLETED FOR PRE-TRIAL CONFERENCE; CHECK LOCAL RULES APPLICABLE TO CONFERENCE.

07-04-88 WWP 5.50 632.50
PREPARE FOR PRE-TRIAL CONFERENCE BY REVIEWING PRE-TRIAL ORDER FILED WITH MAGISTRATE, EXHIBITS, DISPUTED FACTS, PROOFREAD DOCUMENTS FOR EXHIBITS, PHOTOGRAPHS, MAPS, PARTIAL SUMMARY JUDGMENT MOTIONS, MAGISTRATE'S

ORDER, REQUESTS TO ADMIT AND ANSWERS AND TRASCRIPTS [sic]; DISCUSS PRE-TRIAL STRATEGY.

07-04-88 RNB 2.60 182.00
PREPARATION FOR PRE-TRIAL CONFERENCE; COMPILE MAPS, PHOTOGRAPHS AND DOCUMENTS TO BE MARKED AS EXHIBITS.

07-05-88 WWP 6.50 747.50
PRE-TRIAL CONFERENCE IN RUTLAND; OUTLINE TASKS FOR TRIAL; REVIEW TRANSCRIPT STATUS.

07-05-88 RNB 5.40 378.00
PREPARATION FOR AND ATTEND PRE-TRIAL CONFERENCE; ANALYSIS OF ADMISSIBILITY OF EXHIBITS ADMITTED DURING HEARING ON MOTION FOR PRELIMINARY INJUNCTION.

07-05-88 RAM 0.50 25.00
ANALYZE ADMISSIBILITY OF EVIDENCE AT PRELIMINARY INJUNCTION HEARING FOR TRIAL.

07-05-88 MJC 1.00 45.00
EDIT ERNIE DAGUE, JR. AND JAMES OGDEN TRANSCRIPTS FROM HEARINGS ON MOTION FOR PRELIMINARY INJUNCTION.

07-06-88 WWP 0.80 92.00
REVIEW OGDEN AND DAGUE TRANSCRIPT STATUS; REVIEW PROGRESS ON MEMORANDA REQEUSTED [sic] BY COURT.

07-06-88 MJC 4.20 189.00
ORGANIZE FILE IN PREPARATION FOR PRE-TRIAL WORK; REVIEW HEARING TAPES AND EDIT OGDEN TRANSCRIPT.

07-08-88 RNB 0.40 28.00
REVIEW AND PROOFREAD TRANSCRIPT OF ERNEST DAGUE, JR.'S TESTIMONY AT HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

07-11-88 WWP 0.60 69.00
TELEPHONE CONFERENCE WITH MR. CAIN; REVIEW DAGUE AND OGDEN TRANSCRIPT STATUS.

07-11-88 RNB 2.20 154.00
CONTINUE TO REVIEW AND PROOFREAD TRANSCRIPT OF JAMES OGDEN'S TESTIMONY AT HEARINGS ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

07-12-88 WWP 2.70 310.50
REVIEW ERNIE DAGUE, JR. AND JIM OGDEN TRANSCRIPTS; ANALYZE ISSUES REGARDING CITY OPERATING LANDFILL WITHOUT LAWFUL AUTHORITY.

07-12-88 RNB 3.80 266.00
ANALYSIS OF ACT NO. 78, SECTION 20; BEGIN DRAFTING MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW.

07-13-88 WWP 1.50 172.50
FURTHER ANALYSIS OF MEMORANDUM CLAIMING CITY OPERATES LANDFILL WITHOUT LEGAL AUTHORITY.

07-13-88 RNB 3.20 224.00
LETTER TO ATTORNEY CLAPP REGARDING TAPES AND TRANSCRIPTS OF ERNEST DAGUE, JR.'S AND JAMES OBDEN'S TESTIMONY AT HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; FURTHER ANALYSIS OF TRANSITIONAL

OPERATION AUTHORIZATION ISSUED TO CITY'S LANDFILL AND ACT NO. 78, SECTION 20 AND 10 V.S.A. SECTION 6605A; CONTINUE DRAFTING MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; REVISE AND PROOFREAD SAME.

07-13-88 RAM 1.60 80.00
BEGIN LEGAL RESEARCH CONCERNING WHETHER EVIDENCE ADMITTED AT PRELIMINARY INJUNCTION HEARING IS AUTOMATICALLY ADMISSIBLE AT TRIAL.

07-13-88 MJC 2.00 90.00
REVIEW TRANSCRIPTS OF PRELIMINARY INJUNCTION HEARING TESTIMONY REGARDING ADMISSION OF CITY EXPERT'S REPORTS; EDIT SAME.

07-14-88 WWP 1.00 115.00
FURTHER ANALYSIS OF MEMORANDUM CLAIMING THAT THE CITY OF BURLINGTON IS OPERATING ITS LANDFILL WITHOUT LEGAL AUTHORITY; REVIEW STATUS OF DEPOSITION.

07-14-88 RAM 0.80 40.00
LEGAL RESEARCH OF RULE 65(A)(2) AND CASE AUTHORITY WHICH WOULD SUPPORT PROPOSITION THAT EVIDENCE ADMITTED AT PRELIMINARY INJUNCTION HEARING IS AUTOMATICALLY ADMISSIBLE AT TRIAL.

07-14-88 MJC 0.80 36.00
TELEPHONE CONFERENCE WITH FEDERAL COURT FOR NEW COPY OF DEFECTIVE TAPE; EDIT TRANSCRIPT OF MOREAU TESTIMONY AND ADMISSION OF KEY DOCUMENTS.

07-15-88 RNB 0.40 28.00
PREPARE PLAINTIFFS' STATEMENT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; PROOFREAD SAME.

07-18-88 WWP 1.00 115.00
REVIEW AND ANALYZE MOTION FOR PARTIAL SUMMARY JUDGMENT; REVIEW NOTICE REGARDING INCREASE IN LANDFILL FEE.

07-18-88 RNB 1.40 98.00
FURTHER ANALYSIS OF ARGUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DRAFT REVISIONS AND ADDITIONAL ARGUMENTS TO SAME.

07-19-88 MJC 1.00 45.00
EDIT MOREAU TRANSCRIPT REGARDING ADMISSION OF CITY'S EXPERT'S REPORTS.

07-20-88 RNB 1.20 84.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING DEADLING [sic] FOR FILING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR CONFIRMING 10 ISSUES OF FACT; ASSIGNMENT TO SUMMER ASSOCIATE REGARDING LEGISLATIVE HISTORY TO ACT NO. 78; FURTHER ANALYSIS OF ADMISSIBILITY OF O'BRIEN & GERE REPORT.

07-20-88 RAM 2.90 145.00
CONTINUE LEGAL RESEARCH REGARDING APPLICABILITY OF RULE 65(A)(2) AND WHETHER EVIDENCE ADMITTED DURING PRELIMINARY INJUNCTION STAGE IS AUTOMATICALLY ADMISSIBLE AT TRIAL; REVIEW MAGISTRATE'S RECOMMENDATION AND

COURT ORDER ON PRELIMINARY INJUNCTION TO DETERMINE IF ADMISSIBILITY OF O'BRIEN & GERE REPORT WAS QUESTIONED.

07-20-88 MLJ 3.40 102.00
TELEPHONE CONFERENCE WITH SHIRLEY ADAMS REGARDING LEGISLATIVE HISTORY OF ACT 78; LEGAL RESEARCH OF LEGISLATIVE HISTORY OF ACT 78.

07-21-88 MLJ 5.70 171.00
LEGAL RESEARCH AND ANALYSIS OF ACT 78, INCLUDING REVIEW OF LEGISLATIVE HISTORY IN MONTPELIER.

07-22-88 RNB 0.40 28.00
SERVICE AND FILING OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND STATEMENT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT.

07-23-88 RAM 5.20 260.00
LEGAL RESEARCH REGARDING ADMISSIBILITY OF O'BRIEN & GERE REPORT AS A NON-HEARSAY ADMISSION OF AN AGENT UNDER RULE 801(D)(2)(D); BEGIN DRAFTING MOTION AND MEMORANDUM REGARDING THE ADMISSIBILITY OF THE O'BRIEN & GERE REPORT.

07-24-88 WWP 0.80 92.00
REVIEW AND OUTLINE TASKS FOR THE NEXT TWO WEEKS.

07-25-88 RAM 0.50 25.00
REVISE AND FINALIZE FIRST DRAFT OF MEMORANDUM REGARDING ADMISSIBILITY AT TRIAL OF O'BRIEN & GERE REPORT

07-27-88 WWP 0.70 80.50
REVIEW LETTER TO ATTORNEY CLAPP; REVIEW AND EDIT LETTER TO JUDGE BILLINGS.

07-27-88 RNB 2.20 154.00
DRAFT LETTER TO JUDGE BILLINGS REGARDING CITY'S FAILURE TO COMPLY WITH DEADLINES; DRAFT LETTER TO ATTORNEY CLAPP REGARDING STIPULATION OF EXHIBITS; REVISE LETTER TO JUDGE BILLINGS; REVIEW AND ANALYSIS OF MOTION TO DETERMINE ADMISSIBILITY AT TRIAL OF O'BRIEN & GERE REPORT AND SUPPORTING MEMORANDUM OF LAW; REVISE SAME.

07-27-88 RAM 0.50 25.00
ANALYSIS OF MEMORANDUM REQUESTING ADMISSION AT TRIAL OF O'BRIEN & GERE REPORT; IDENTIFY ISSUES IN NEED OF FURTHER LEGAL RESEARCH.

07-27-88 MLJ 0.80 24.00
DRAFT MEMORANDUM REGARDING STATUS OF LEGISLATIVE HISTORY RESEARCH.

07-28-88 WWP 0.80 92.00
TELEPHONE CONFERENCE WITH THE COURT; REVIEW AND EDIT MOTION.

07-28-88 RNB 0.80 56.00
DRAFT MOTION FOR ORDER THAT TEN FACTS BE DEEMED ADMITTED FOR TRIAL; SERVICE AND FILING OF SAME.

07-28-88 RAM 2.60 130.00
LEGAL RESEARCH REGARDING CASES WHICH HAVE FOUND INVESTIGATIVE REPORTS OF AGENTS TO BE ADMISSIBLE EVIDENCE UNDER FRE 801(D)(2)(D).

07-29-88 WWP 0.80 92.00
REVIEW AND EDIT MOTION TO DETERMINE ADMISSIBILITY OF O'BRIEN & GERE REPORT.

07-29-88 RNB 2.50 175.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING STIPULATION OF EXHIBITS; COMPILE EXHIBITS; CONFERENCE WITH ATTORNEY CLAPP REGARDING SAME.

07-29-88 RAM 1.50 75.00
FINAL REVISION OF MEMORANDUM SEEKING ADMISSIBILITY OF O'BRIEN & GERE REPORT.

07-29-88 MJC 2.00 90.00
PREPARATION FOR AND MEETING WITH ATTORNEY CLAPP TO STIPULATE TO ADMISSION OF FACT DOCUMENTS.

08-01-88 RNB 0.40 28.00
LETTER TO ATTORNEY CLAPP TO CONFIRM OUR CONFERENCE REGARDING STIPULATION OF EXHIBITS.

08-02-88 WWP 2.40 276.00
REVIEW CITY'S MOTION IN LIMINE; RESEARCH AGENCY UNDER FRE 801(2)(D) AND OTHER ARGUMENTS FOR ADMISSION OF EXHIBIT 50.

08-02-88 RNB 0.80 56.00
REVIEW AND ANALYSIS OF CITY'S MOTION IN LIMINE AND SUPPORTING MEMORANDUM OF LAW.

08-02-88 RAM 0.80 40.00
REVIEW CITY MEMORANDUM SEEKING EXCLUSION OF O'BRIEN & GERE REPORT; ANALYSIS OF ISSUE RAISED CONCERNING

WHETHER O'BRIEN & GERE IS AGENT FOR PURPOSE OF RULE 801(D)(2)(D).

08-04-88 WWP 0.50 57.50
REVIEW AND ANALYZE CITY'S ADMISSIONS.

08-04-88 RNB 0.50 35.00
REVIEW AND ANALYSIS OF CITY'S ADMISSION OF 9 FACTS.

08-05-88 WWP 0.80 92.00
REVIEW MOTION TO ADMIT O'BRIEN & GERE REPORT; ANALYZE ADDITIONAL GROUNDS TO SUPPORT MOTION.

08-05-88 RNB 1.10 77.00
FURTHER ANALYSIS OF CITY'S MOTION IN LIMINE AND OPPOSING ARGUMENTS THERETO; FURTHER ANALYSIS OF CITY'S ADMISSIONS OF FACT ON TRIALS OF FEDERAL AND PENDANT CLAIMS.

08-08-88 WWP 0.80 92.00
REVIEW CITY'S RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT.

08-08-88 RNB 1.00 70.00
THOROUGH REVIEW AND ANALYSIS OF CITY'S OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

08-09-88 WWP 1.50 172.50
TELEPHONE CONFERENCE WITH MRS. DAGUE; CONFERENCE WITH MRS. DAGUE; READ NOTICE OF HEARING.

08-09-88 RNB 0.40 28.00
BRIEF CONFERENCE WITH MRS. DAGUE REGARDING STATUS OF CASE.

08-16-88 WWP 1.00 115.00
REVIEW DRAFT VERSION OF STATE'S NEW SOLID WASTE GUIDELINES.

08-16-88 RNB 0.60 42.00
LETTER TO ATTORNEY CLAPP REGARDING WATER TEST RESULTS; ANALYSIS OF DRAFT SOLID WASTE MANAGEMENT RULES REGARDING TRANSITIONAL OPERATION AUTHORIZATIONS.

08-16-88 MLJ 7.30 219.00
LEGAL RESEARCH AND ANALYSIS REGARDING LEGISLATIVE HISTORY OF ACT 78; DRAFT MEMORANDUM REGARDING SAME.

08-18-88 WWP 0.40 46.00
REVIEW LEGISLATIVE HISTORY OF ACT 78.

08-19-88 WWP 1.00 115.00
REVIEW MEMORANDUM AND SUPPORTING TRANSCRIPTS FOR LEGISLATIVE HISTORY; RESEARCH ON SOLID WASTE LAW AS IT RELATES TO MOTION FOR PARTIAL SUMMARY JUDGMENT.

08-19-88 RNB 0.70 49.00
REVIEW TRANSCRIPTS OF LEGISLATIVE HISTORY FOR ACT 78.

08-19-88 RAM 1.80 90.00
LEGAL RESEARCH FOR CASES UNDER FEDERAL RULE OF EVIDENCE 801(D)(2) WHICH HAVE FOUND THAT A REPORT DRAFTED BY AN INDEPENDENT PARTY AT THE REQUEST OF A PARTY IS ADMISSIBLE AS AN ADMISSION OF THE PARTY; MEMORANDUM REGARDING SAME.

08-23-88 RNB 0.60 42.00
ANALYSIS OF STIPULATED AND DISPUTED FACTS REGARDING METHANE GAS AS THEY

PERTAIN TO FEDERAL AND PENDANT STATE CLAIMS.

08-26-88 RNB 1.30 91.00
LEGAL RESEARCH ON COMMON LAW CAUSES OF ACTION AND DEFENSES THERETO IN PREPARATION FOR TRIAL ON PENDANT STATE CLAIMS.

08-29-88 RNB 0.30 21.00
FOLLOW-UP LETTER TO ATTORNEY CLAPP REGARDING WATER TEST RESULTS.

08-30-88 WWP 0.30 34.50
REVIEW STATUS OF CITY CONFIRMATION OF WATER TESTS RESULTS.

09-02-88 RNB 0.40 28.00
ANALYSIS OF ADMISSIBILITY OF O'BRIEN & GERE REPORT UNDER F.R.E 801.

09-02-88 RAM 1.00 50.00
BEGIN ANALYSIS AND DRAFTING OF REPLY MEMORANDUM TO DEFENDANT'S MOTION IN LIMINE; ANALYSIS OF APPLICABILITY OF RULE 801(D)(2)(C) AND SUPPORTING CASES.

09-05-88 RAM 1.90 95.00
DRAFT REPLY MEMORANDUM TO DEFENDANT'S MOTION IN LIMINE.

09-08-88 RNB 2.00 140.00
LEGAL RESEARCH ON COMPENSATION FOR PARALEGAL HOURS AND ENHANCEMENT OF ATTORNEYS' FEES; LEGAL RESEARCH ON EPA PROPOSED REGULATIONS TO REVISE RCRA CRITERIA FOR MUNICIPAL SOLID WASTE DISPOSAL FACILITIES AND PRACTICES; REVIEW AND EDIT PLAINTIFFS' SUPPLEMENTAL MEMORANDUM ON THE ADMISSIBILITY OF THE O'BRIEN & GERE REPORT; SERVICE AND FILING OF SAME.

09-09-88 RNB 0.40 28.00
PREPARATION FOR HEARING ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

09-12-88 WWP 5.50 632.50
PREPARE FOR AND ATTEND HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO ADMIT O'BRIEN & GERE REPORT.

09-12-88 RNB 5.50 385.00
PREPARATION FOR AND ATTEND HEARING ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO DETERMINE ADMISSIBILITY OF THE O'BRIEN & GERE REPORT.

09-20-88 WWP 0.50 57.50
REVIEW CITY'S MEMORANDUM ON ADMISSIBILITY OF O'BRIEN & GERE REPORT.

09-20-88 RNB 0.50 35.00
REVIEW AND ANALYSIS OF DEFENDANT'S REPLY TO PLAINTIFFS' MOTION TO DETERMINE ADMISSIBILITY AT TRIAL OF THE O'BRIEN & GERE REPORT.

09-22-88 WWP 0.30 34.50
OUTLINE LETTER TO THE COURT ON O'BRIEN & GERE REPORT'S ADMISSIBILITY.

09-22-88 RNB 0.30 21.00
FURTHER REVIEW AND ANALYSIS OF DEFENDANT'S REPLY TO PLAINTIFFS' MOTION TO DETERMINE ADMISSIBILITY AT TRIAL OF THE O'BRIEN & GERE REPORT.

09-26-88 RNB 0.30 21.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP'S OFFICE REGARDING RETURN OF WATER TEST RESULTS.

09-29-88 WWP 0.30 34.50
TELEPHONE CONFERENCE WITH MR. CAIN.

10-17-88 WWP 0.30 34.50
REVIEW STATUS OF CASE.

10-24-88 WWP 0.50 57.50
REVIEW COURT'S OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND ADMISSION OF O'BRIEN & GERE REPORT.

10-24-88 RNB 0.50 35.00
REVIEW AND ANALYSIS OF OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTIONS ON THE ADMISSIBILITY OF THE O'BRIEN & GERE REPORT.

10-31-88 RNB 0.30 21.00
REVIEW INTERVALE ASSESSMENT PREPARED BY DR. HUDSPETH.

10-31-88 MJC 0.80 36.00
REVIEW CITY REPORT ON STATUS OF WETLANDS; MEMORANDUM REGARDING CITY ADMISSION OF CONTAMINATION OF INTERVALE BY LANDFILL.

11/04/88 WWP 0.50 57.50
ANALYZE OPTIONS REGARDING O'BRIEN & GERE EVIDENCE; REVIEW TRIAL

11/04/88 RNB 0.60 42.00
PLAN FOR DEPOSITION OF O'BRIEN & GERE REGARDING REPORT; CURSORY REVIEW OF REPORT.

11/04/88 MJC 0.50 22.50
FACT RESEARCH REGARDING O'BRIEN & GERE REPORT.

11/07/88 MJC 2.00 90.00
REVIEW FILE; TELEPHONE CONFERENCE WITH O'BRIEN & GERE FOR SCHEDULING DEPOSITION; ANALYSIS OF FACT ISSUES REGARDING TESTIMONY TO BE GIVEN.

11/10/88 MJC 0.50 22.50
TELEPHONE CONFERENCE WITH WITNESS FROM O'BRIEN & GERE REGARDING DEPOSITION AND IDENTIFICATION OF WITNESS WITH PERSONAL KNOWLEDGE OF DISPUTED FACTS.

11/17/88 WWP 0.30 34.50
TELEPHONE CONFERENCE WITH BETTY DAGUE.

11/18/88 MJC 0.50 22.50
TELEPHONE CONFERENCE WITH CLIENT REGARDING GAS EXPLOSION AT LANDFILL; REPORT TO ATTORNEY BLAND REGARDING SAME.

11/21/88 MJC 0.50 22.50
REVIEW NEWS REPORT OF GAS EXPLOSION; TELEPHONE CONFERENCE WITH CLIENT REGARDING SAME AND CITY TESTING OF YARD FOR GAS; MEMORANDUM TO ATTORNEY PEARSON REGARDING SAME.

11/29/88 WWP 0.40 46.00
TELEPHONE CONFERENCE WITH CLIENT.

12/12/88 RNB 0.30 21.00
TELEPHONE CONFERENCE WITH ATTORNEY CAIN REGARDING STATUS OF CASE.

01/12/89 WWP 0.20 25.00
REVIEW COURT HEARING DATE.

01/12/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH CLERK OF COURT REGARDING TRIAL BY COURT ON FEDERAL CLAIMS.

01/13/89 WWP 0.20 25.00
REVIEW TRIAL SCHEDULE.

01/16/89 WWP 0.40 50.00
TRIAL PREPARATION ON OVERALL STRATEGY, LEGAL ISSUES, WITNESSES, SETTLEMENT, AND DISCOVERY.

01/16/89 RNB 0.40 32.00
PLAN FOR FURTHER INVESTIGATION AND DISCOVERY AND BRIEF ANALYSIS OF LEGAL ISSUES FOR TRIAL BY COURT.

01/19/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING WATER TEST RESULTS, TRANSCRIPTS OF ERNEST DAGUE'S AND JAMES OGDEN'S TESTIMONY, AND AUTHORIZATION TO SPEAK WITH MR. KACZMAR OF O'BRIEN & GERE.

01/20/89 RNB 0.30 24.00
LETTER TO ATTORNEY CLAPP REGARDING AUTHORIZATION TO SPEAK WITH MR. KACZMAR OF O'BRIEN & GERE.

01/31/89 RNB 3.50 280.00
ORGANIZE FILE; LEGAL RESEARCH UPDATE UNDER RCRA.

01/31/89 MJC 0.30 15.00
TELEPHONE CONFERENCE WITH VANR FOR COPY OF SITE INVESTIGATION REPORT.

02/01/89 WWP 0.70 87.50
NOTE HEARING DATE; REVIEW STATUS OF O'BRIEN & GERE DEPOSITION.

02/01/89 RNB 4.70 376.00
CONTINUE LEGAL RESEARCH UPDATE UNDER CWA; COMPILE ADDITIONAL EXHIBITS FROM FILE FOR TRIAL; REVIEW STIPULATION OF FACTS; PREPARE TRIAL OUTLINE OF FEDERAL CLAIMS BY WITNESSES; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING AUTHORIZATION TO SPEAK WITH MR. KACZMAR AND STIPULATION REGARDING TRANSCRIPT OF JAMES OGDEN'S TESTIMONY.

02/02/89 WWP 2.00 250.00
REVIEW TRIAL SCHEDULE; PROOFREAD TRANSCRIPTS OF TESTIMONY FOR INTRODUCTION INTO EVIDENCE, EXHIBIT OBJECTIONS AND O'BRIEN & GERE DEPOSITION STATUS.

02/02/89 RNB 1.20 96.00
REVIEW AND ANALYZE FINAL SITE INSPECTION REPORT OF THE LANDFILL BY EPA CONTRACTOR, NUS CORP.

02/03/89 WWP 2.20 275.00
TRIAL PREPARATION: EVALUATE TRIAL WITNESSES, EXHIBITS AND ADMISSIONS; TWO TELEPHONE CONFERENCES WITH CLIENTS; ORGANIZE AND EVALUATE WATER TEST RESULTS AGAINST NEW STATE GROUNDWATER REGULATIONS.

02/03/89 RNB 2.80 224.00
ANALYZE WITNESS TESTIMONY FOR TRIAL OF FEDERAL CLAIMS; FURTHER REVIEW OF JAMES OGDEN'S TESTIMONY.

02/03/89 MJC 1.50 75.00
CONFERENCE WITH ATTORNEY PEARSON REGARDING EPA REPORT, STATE GROUNDWATER REGULATIONS, NEED TO CONTACT

CLIENTS TO DISCUSS UPCOMING TRIAL AND SETTLEMENT STATUS; TELEPHONE CONFERENCE WITH CLIENTS REGARDING SAME; REVIEW STATE GROUNDWATER REGULATIONS.

02/06/89 WWP 1.50 187.50
TELEPHONE CONFERENCE WITH MR. DAGUE; CONFERENCE WITH CLIENTS.

02/06/89 RNB 2.30 184.00
REVIEW AND ANALYSIS OF VERMONT'S GROUNDWATER PROTECTION RULE AND STRATEGY; CONFERENCE WITH BETTY DAGUE AND ERNIE DAGUE, SR. REGARDING STATUS OF CASE AND SETTLEMENT.

02/06/89 MJC 1.00 50.00
TELEPHONE CONFERENCE WITH VANR REGARDING COPY OF CURRENT GROUNDWATER REGULATIONS AND CLASSIFICATION OF STATE GROUNDWATER; REPORT TO ATTORNEY BLAND REGARDING SAME; MEETING WITH CLIENTS REGARDING UPCOMING TRIAL AND SETTLEMENT STATUS.

02/07/89 WWP 0.30 37.50
UPDATE DEPOSITION STATUS.

02/07/89 MJC 5.50 275.00
ATTEND LAMOILLE COUNTY REGIONAL SOLID WASTE DISTRICT MEETING IN MORRISVILLE TO MONITOR CITY AND STATE REPRESENTATIONS REGARDING CITY'S LANDFILL.

02/08/89 MJC 0.60 30.00
MEMORANDUM REGARDING SOLID WASTE DISTRICT MEETING AND CITY AND STATE

STATEMENTS REGARDING CITY'S LANDFILL.

02/09/89 WWP 0.30 37.50
TELEPHONE CONFERENCE WITH COURT.

02/10/89 WWP 1.00 125.00
TELEPHONE CONFERENCE WITH MR. CLAPP; REVIEW STATE AND CITY REPRESENTATIONS AT RECENT PUBLIC HEARING.

02/10/89 RNB 0.20 16.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING DEPOSITION TO PERPETUATE TESTIMONY OF SWIATOSLOV KACZMAR.

02/13/89 WWP 1.50 187.50
TELEPHONE CONFERENCE WITH MR. MCKEARIN; REVIEW TRIAL PREPARATION.

02/14/89 RNB 0.20 16.00
TELEPHONE CONFERENCE WITH DR. FRANK REED'S OFFICE REGARDING UPCOMING TRIAL.

02/15/89 WWP 1.50 187.50
REVIEW BESSETTE INVOLVEMENT IN CASE; LETTER TO MR. BESSETTE; REVIEW O'BRIEN & GERE DEPOSITION STATUS; TELEPHONE CONFERENCE WITH MR. MCKEARIN.

02/15/89 RNB 0.40 32.00
TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING DEPOSITION OF MR. KACZMAR; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SAME.

02/16/89 WWP 1.00 125.00
REVIEW O'BRIEN & GERE DEPOSITION STATUS; ASCERTAIN AVAILABILITY OF PROFESSOR REED FOR TRIAL; NOTE TRIAL SCHEDULE.

02/20/89 RNB 0.40 32.00
EXTENDED TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HIS OPINION AS AN EXPERT WITNESS AT TRIAL THAT THE LANDFILL MAY PRESENT A SUBSTANTIAL AND IMMINENT HAZARD TO THE ENVIRONMENT.

02/21/89 WWP 3.50 437.50
REVIEW STATUS OF O'BRIEN & GERE DEPOSITION, BESSETTE PARTICIPATION IN TRIAL, TESTIMONY OF PROFESSOR REED, FINDINGS OF FACT AND DISPUTED FACTS.

02/28/89 WWP 1.00 125.00
TELEPHONE CONFERENCE WITH COURT; TELEPHONE CONFERENCE WITH ATTORNEY CAIN; REVIEW O'BRIEN & GERE DEPOSITION STATUS; READ BURLINGTON FREE PRESS ARTICLE ON LANDFILL.

02/28/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING DR. KACZMAR'S DEPOSITION, POSTPONEMENT OF TRIAL AND COMPILATION OF INFORMATION IN PREPARATION FOR HIS RENDERING AN OPINION THAT THE LANDFILL MAY PRESENT A SUBSTANTIAL AND IMMINENT HAZARD TO THE ENVIRONMENT.

03/01/89 WWP 0.20 25.00
RESCHEDULE O'BRIEN & GERE DEPOSITION.

03/01/89 RNB 1.00 80.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING DEPOSITION OF DR. KACZMAR; PREPARATION FOR CONFERENCE WITH DR. REED AND PREPARATION FOR DEPOSITION OF DR. KACZMAR.

03/02/89 WWP 3.00 375.00
PREPARE FOR AND ATTEND MEETING WITH DR. REED.

03/02/89 RNB 2.70 216.00
FURTHER PREPARATION FOR AND CONFERENCE WITH DR. FRANK REED REGARDING HIS EXPERT OPINION ON LANDFILL.

03/06/89 WWP 2.50 312.50
PREPARE FOR O'BRIEN & GERE DEPOSITION.

03/06/89 RNB 2.30 184.00
PREPARATION FOR DEPOSITION OF DR. KACZMAR; LEGAL RESEARCH UPDATE OF CASE LAW ON WHAT CONSTITUTES AN "IMMINENT AND SUBSTANTIAL ENDANGERMENT" UNDER RCRA.

03/07/89 WWP 5.20 650.00
FURTHER PREPARATION FOR O'BRIEN & GERE DEPOSITION; DEPOSITION OF TOXICOLOGIST KACZMAR OF O'BRIEN & GERE; REVIEW RESULTS OF DEPOSITION.

03/07/89 RNB 5.80 464.00
FURTHER PREPARATION FOR AND ATTEND DEPOSITION OF DR. KACZMAR.

03/07/89 MJC 0.60 30.00
PREPARATION FOR DEPOSITION OF O'BRIEN & GERE REPRESENTATIVE.

03/08/89 WWP 1.00 125.00
ANALYZE DR. REED'S TESTIMONY; ANALYZE STATUS.

03/09/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH DR. REED REGARDING HIS EVALUATION OF WATER TEST RESULTS.

03/14/89 WWP 0.50 62.50
REVIEW PRETRIAL PREPARATION.

03/14/89 RNB 0.40 32.00
PREPARATION FOR TRIAL REGARDING LIST OF WITNESSES, TRIAL NOTEBOOK, STATEMENT OF FACTS AND ADDITIONAL PROPOSED FINDINGS OF FACT AND ANALYZE SUBSTANTIAL AND IMMINENT HAZARD COUNT.

03/15/89 RNB 0.80 64.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HIS ANALYSIS OF LEACHATE TEST RESULTS AND EXPERT OPINION REGARDING HAZARD OF LANDFILL; REPORT TO ATTORNEY PEARSON REGARDING SAME AND FURTHER ANALYZE SUBSTANTIAL AND IMMINENT HAZARD COUNT.

03/16/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH DR. REED REGARDING USE OF INTERVALE WETLAND BY MCNEIL PLANT AND GARDENER'S SUPPLY.

03/28/89 RNB 0.20 16.00
REVIEW DR. REED'S MARCH 23, 1989 LETTER.

03/30/89 WWP 0.20 25.00
READ DR. REED'S LETTER.

03/31/89 WWP 0.50 62.50
ANALYZE EXPERT TESTIMONY FOR TRIAL.

04/05/89 WWP 0.70 87.50
REVIEW DR. KACZMAR'S DEPOSITION.

04/07/89 RNB 1.50 120.00
REVIEW DEPOSITION OF DR. SWIATOSLAV KACZMAR FOR ADDITIONAL PROPOSED FINDINGS OF FACT.

04/11/89 WWP 1.00 125.00
REVIEW TRIAL DATE; REVIEW EXPERT STATUS; OUTLINE WORK TO BE DONE FOR TRIAL.

04/11/89 RNB 0.40 32.00
FURTHER ANALYSIS OF SUBSTANTIAL AND IMMINENT ENDANGERMENT CLAIM AND RETENTION OF EXPERT FOR THAT CLAIM.

04/17/89 RNB 0.20 16.00
REVIEW DEFENDANT'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' INTERROGATORIES DATED MARCH 16, 1989.

04/20/89 WWP 0.20 25.00
REVIEW CITY'S DISCLOSURE OF ADDITIONAL EXPERT.

04/21/89 WWP 1.50 187.50
REVIEW PRE-TRIAL WORK; DECIDE ON PROFESSOR READ [sic] PARTICIPATION.

04/21/89 RNB 0.50 40.00
FURTHER ANALYSIS OF CLAIMS AND WITNESSES' TESTIMONY IN PREPARATION FOR TRIAL.

04/22/89 RNB 1.50 120.00
COMPILE DOCUMENTS REGARDING FEDERAL CLAIMS FOR TRIAL NOTEBOOK.

04/24/89 WWP 2.00 250.00
REVIEW AND ANALYZE STIPULATED FACTS, PRE-TRIAL ORDER AND FEDERAL STATUTES.

04/24/89 RNB 0.60 48.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HIS EXPERT OPINION ON SUBSTANTIAL AND IMMINENT ENDANGERMENT CLAIM; LETTER TO DR. REED REGARDING SAME.

04/24/89 MJC 2.50 125.00
TELEPHONE CONFERENCE WITH DR. FRANK REED TO SCHEDULE LANDFILL VISIT; TELEPHONE CONFERENCE WITH VANR REGARDING WATER TEST RESULTS; REVIEW FILE AND ASSEMBLE ALL WATER TEST RESULTS.

04/25/89 MJC 1.80 90.00
REVIEW FILE; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING WATER TEST RESULTS; TELEPHONE CONFERENCE WITH CLIENTS REGARDING UPCOMING TRIAL; LETTERS TO CLIENTS REGARDING SAME; TRIAL PREPARATION.

04/26/89 WWP 1.00 125.00
REVIEW PROPOSED FACTS; TRIAL PREPARATION.

04/26/89 RNB 2.80 224.00
DRAFT ADDITIONAL PROPOSED FINDINGS OF FACT; COMPILE ALL STIPULATED FACTS INTO STIPULATION OF FACTS.

04/27/89 WWP 1.00 125.00
FURTHER TRIAL PREPARATION.

04/27/89 RNB 1.00 80.00
DRAFT ADDITIONAL PROPOSED FINDINGS OF FACT.

04/27/89 MJC 0.60 30.00
TELEPHONE CONFERENCE WITH CLIENTS AND OPPOSITE COUNSEL REGARDING TRIAL DATE; LANDFILL SITE VISIT; REVIEW FILES FOR DR. REED DEPOSITION EXHIBITS.

04/28/89 MJC 3.00 150.00
LANDFILL VISIT WITH DR. FRANK REED.

05/01/89 WWP 7.50 937.50
TRIAL PREPARATION; TELEPHONE CONFERENCE WITH MR. CLAPP; TELEPHONE CONFERENCE WITH CLIENT; TELEPHONE CONFERENCE WITH DR. REED; TELEPHONE CONFERENCE WITH COURT.

05/01/89 RNB 3.30 264.00
ANALYZE STIPULATION OF FACTS, PLAINTIFFS' PROPOSED FINDINGS OF FACT, WITNESSES' TESTIMONY AND TRIAL EXHIBITS; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HIS EXPERT OPINION; LETTER TO CLERK OF COURT REGARDING FILING OF STIPULATION OF FACTS AND TRANSCRIPTS OF MESSRS. OGDEN AND DAGUE'S TESTIMONY DURING HEARING ON PRELIMINARY INJUNCTION.

05/01/89 MJC 5.00 250.00
TELEPHONE CONFERENCE WITH BETTY DAGUE REGARDING UPCOMING TRIAL; LETTER TO MRS. DAGUE REGARDNG SAME; CONFERENCE WITH ATTORNEY PEARSON AND ATTORNEY BLAND REGARDING TRIAL PREPARATION AND EVIDENTIARY SUPPORT OF STIPULATED AND PROPOSED FACTS; TELEPHONE CONFERENCE WITH DR.

FRANK REED REGARDING HIS OPINIONS AND PROVISION OF REED DEPOSITION EXHIBITS TO OPPOSITE COUNSEL; TELEPHONE CONFERENCE WITH OPPOSITE COUNSEL REGARDING SAME; REVIEW PROPOSED FACTS AND COMPARE WITH WITNESS TESTIMONY AND EXHIBITS.

05/02/89 WWP 6.70 837.50
TELEPHONE CONFERENCE WITH MR. MCKEARIN; TELEPHONE CONFERENCES WITH COURT; TRIAL PREPARATION.

05/02/89 RNB 5.80 464.00
DETAILED ANALYSIS OF FEDERAL CLAIMS AND STATE GROUNDWATER CAUSE OF ACTION BASED UPON STIPULATION OF FACTS AND PROPOSED FINDINGS OF FACT; PREPARATION FOR EXAMINATION OF WITNESSES; ANALYZE EVIDENTIARY ISSUES; DRAFT MEMORANDUM REGARDING CHRONOLOGY OF STIPULATION OF FACTS; COMPILE AND REVIEW FACTUAL DOCUMENTS AND CASELAW TO SUPPORT CLAIMS.

05/02/89 MJC 2.80 140.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING DEPOSITION EXHIBITS AND WATER TEST RESULTS; ORGANIZE FILE IN PREPARATION FOR TRIAL; CONFERENCE WITH ATTORNEY PEARSON REGARDING TRIAL PREPARATION.

05/03/89 WWP 7.50 937.50
TRIAL PREPARATION.

05/03/89 RNB 7.30 584.00
LEGAL RESEARCH OF CASELAW ON DISPLACEMENT OF CITIZEN SUIT ENFORCEMENT UNDER RCRA BY STATE AUTHORIZED HAZARDOUS WASTE PROGRAM "DISPOSAL"

OF HAZARDOUS WASTE UNDER RCRA, ASSESSMENT OF CIVIL PENALTIES UNDER FEDERAL ENVIRONMENTAL LAWS, AND STANDARDS AND LIABILITY FOR SUBSTANTIAL AND IMMINENT ENDANGERMENT UNDER RCRA; DETAILED ANALYSIS OF CITY'S AUTHORITY TO OPERATE THE LANDFILL UNDER FEDERAL LAW, STATE LAW AND TRANSITIONAL OPERATION AUTHORIZATION; LEGAL RESEARCH UNDER F.R.E. 804 REGARDING ADMISSION OF PRIOR TESTIMONY OF WITNESS NOW UNAVAILABLE DUE TO DEATH; ANALYZE STATE'S DECISION NOT TO ASSESS LANDFILL IN LIGHT OF ACT 78 AND TRANSITIONAL OPERATION AUTHORIZATION.

05/03/89 MJC 6.20 310.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING NEW WATER TEST RESULTS AND OTHER DOCUMENTS NEEDED FOR TRIAL; TRIAL PREPARATION AND FILE REVIEW; DRAFT SUBPOENAS FOR STATE WITNESSES; LETTER TO OPPOSITE COUNSEL WITH REED DEPOSITION EXHIBITS.

05/04/89 WWP 6.00 750.00
TRIAL PREPARATION.

05/04/89 RNB 12.30 984.00
REVIEW JAMES OGDEN'S TESTIMONY DURING PRELIMINARY INJUNCTION HEARING REGARDING CITY'S HAZARDOUS WASTE NOTIFICATION TO EPA; ANALYZE JANUARY 3, 1985 ASSURANCE OF DISCONTINUANCE,

TRANSITIONAL OPERATION AUTHORIZATION, AND SEPTEMBER 1, 1987 AMENDMENT TO ASSURANCE OF DISCONTINUANCE; REVIEW CORRESPONDENCE AND MEMORANDA BETWEEN JONATHAN LASH AND CITY OF BURLINGTON REGARDING LANDFILL; PREPARATION FOR AND CONFERENCE WITH DR. FRANK REED IN PREPARATION FOR HIS DEPOSITION AND TRIAL; REVIEW AND ANALYZE DOCUMENTS FROM STATE'S FILE REGARDING TRANSITIONAL OPERATION AUTHORIZATION AND AMENDMENTS TO JANUARY 31, 1985 ASSURANCE OF DISCONTINUANCE; ANALYZE HISTORY OF STATE AUTHORIZATION TO OPERATE LANDFILL SINCE JANUARY 31, 1985 ASSURANCE OF DISCONTINUANCE; ANALYZE TESTIMONY OF WITNESSES FROM STATE REGARDING SAME.

05/04/89 RAM 4.20 294.00
LEGAL RESEARCH REGARDING THE MEANING OF "IMMINENT AND SUBSTANTIAL ENDANGERMENT" AS THAT PHRASE IS USED IN RCRA SECTION 7003; DRAFT MEMORANDUM OF LAW REGARDING SAME.

05/04/89 MJC 7.30 365.00
PREPARATION FOR TRIAL; TELEPHONE CONFERENCE WITH VANR REGARDING FILE REVIEW; REVIEW VANR FILE; CONFERENCE WITH STATE OFFICIALS REGARDING REGULATION OF LANDFILL.

05/05/89 WWP 8.00 1,000.00
TRIAL PREPARATION; ATTEND DEPOSITION OF DR. REED.

05/05/89 RNB 11.20 896.00
PREPARATION FOR AND ATTEND DEPOSITION OF DR. FRANK REED; REVIEW SUBPOENA DUCES TECUM FOR MR. BRIAN HECKENBERGER; DRAFT PROPOSED FINDINGS OF FACT REGARDING LANDFILL AS AN ACTIVE HAZARDOUS WASTE SITE AND LEACHATE AS PRESENTING A SUBSTANTIAL AND IMMINENT ENDANGERMENT TO PUBLIC HEALTH AND THE ENVIRONMENT; CONFERENCE WITH DR. FRANK REED IN PREPARATION FOR TRIAL; ANALYZE CITY'S NONCOMPLIANCE WITH TERMS AND CONDITIONS OF JANUARY 31, 1985 ASSURANCE REGARDING CLOSURE OF LANDFILL AND SELECTION OF AN ALTERNATE SITE.

05/05/89 RAM 0.30 21.00
REVISE MEMORANDUM REGARDING MEANING OF "IMMINENT AND SUBSTANTIAL ENDANGERMENT" UNDER RCRA SECTION 7003.

05/05/89 MJC 5.20 260.00
TRIAL PREPARATION; TELEPHONE CONFERENCE WITH VANR REGARDING RECORDS OF LANDFILL REGULATION; SERVE STATE WITNESS WITH SUBPOENA.

05/06/89 WWP 10.00 1,250.00
TRIAL PREPARATION; DEPOSITION OF MR. COUNTRYMAN.

05/06/89 RNB 15.80 1,264.00
THOROUGH REVIEW OF WILLIAM COUNTRYMAN'S DECEMBER 9, 1985 DEPOSITION IN PREPARATION FOR HIS DEPOSITION; DRAFT ADDITIONAL PROPOSED FINDINGS OF FACT REGARDING TRANSITIONAL OPERATION AUTHORIZATION; AMENDMENTS TO

JANUARY 31, 1985 ASSURANCE OF DISCONTINUANCE, CITY'S NONCOMPLIANCE WITH TERMS THERETO AND STATE ENFORCEMENT EFFORTS; FURTHER PREPARATION FOR AND ATTEND DEPOSITION OF WILLIAM COUNTRYMAN; PREPARE EXAMINATIONS OF MESSRS. MOREAU, GOODKIND, HECKENBERGER AND LASH; LEGAL RESEARCH ON WITHDRAWAL OF FACTS ADMITTED UNDER FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE; COMPILE EXHIBITS AND LEGAL SOURCES IN PREPARATION FOR TRIAL; ANALYZE ORDER OF WITNESSES.

05/07/89 WWP 12.00 1,500.00
TRIAL PREPARATION.

05/07/89 RNB 9.90 792.00
PREPARE EXAMINATION OF DR. KACZMAR; CONFERENCE WITH DR. FRANK REED REGARDING HIS TESTIMONY AT TRIAL; FURTHER REVIEW OF ALL TRIAL EXHIBITS AND FINAL PREPARATION FOR TRIAL.

05/07/89 MJC 6.50 325.00
PREPARATION FOR TRIAL; ORGANIZE OLD AND NEW EXHIBITS; CONFERENCE WITH DR. REED REGARDING FACTS NEEDED FOR EXPERT TESTIMONY; LANDFILL SITE VISIT AND PHOTOS.

05/08/89 WWP 12.00 1,500.00
TRIAL IN RUTLAND; NEXT DAY PREPARATION.

05/08/89 RNB 19.30 1,544.00
REVIEW AND ANALYZE STIPULATION OF FACTS IN PREPARATION FOR TODAY'S TESTIMONY; PREPARE FOR AND ATTEND PRETRIAL CONFERENCE AND TRIAL, ASSISTING

WITH EXAMINATIONS OF MESSRS. MOREAU, GOODKIND AND HECKENBERGER; THROUGH REVIEW AND ANALYSIS OF CITY'S TRIAL MEMORANDUM; PREPARE FOR EXAMINATIONS OF MR. LASH, PROFESSORS REED AND COUNTRYMAN AND DR. KACZMAR; LEGAL RESEARCH ON "POINT SOURCE" UNDER CLEAN WATER ACT.

05/08/89 RAM 0.70 49.00
INITIAL ANALYSIS OF WHETHER A CLEAN WATER ACT VIOLATION CAN BE MADE OUT IF THE "POINT SOURCE" IS LOCATED ON LAND ADJACENT TO THAT OF DEFENDANT.

05/08/89 MJC 11.00 550.00
PREPARATION FOR AND ASSISTANCE AT TRIAL ON FEDERAL CLAIMS IN RUTLAND; TELEPHONE CONFERENCE WITH FIRM LIBRARIAN REGARDING DOCUMENTS NEEDED AS EXHIBITS.

05/09/89 WWP 12.00 1,500.00
TRIAL IN RUTLAND; NEXT DAY PREPARATION.

05/09/89 RNB 17.80 1,424.00
FURTHER ANALYSIS OF CITY'S TRIAL MEMORANDUM; LEGAL RESEARCH UNDER ACT 78 REGARDING SECRETARY'S EMERGENCY POWERS, IF ANY; PREPARE FOR AND ASSIST WITH EXAMINATION OF DR. FRANK REED; PREPARE FOR CROSS-EXAMINATIONS OF WILLIAM COUNTRYMAN AND CRAIG HEINDEL; DETAILED ANALYSIS OF RATE AND FLOW OF GROUNDWATER IN AND AROUND LANDFILL.

05/09/89 RAM 4.20 294.00
LEGAL RESEARCH AT FEDERAL COURT ON THE ISSUE OF WHETHER A "POINT SOURCE" UNDER SECTION 1342 OF THE CLEAN WATER ACT MUST BE LOCATED ON THE POLLUTER'S PROPERTY IN ORDER FOR POLLUTER TO HAVE TO OBTAIN A PERMIT; REVIEW TAX MAPS AND DEEDS OF LANDFILL PROPERTY AND ANALYZE OWNERSHIP ISSUES.

05/09/89 MJC 11.50 575.00
PREPARATION FOR TRIAL; ASSIST AT TRIAL; MARK ADMITTED EXHIBITS TO BE USED AT TRIAL; TELEPHONE CONFERENCE WITH FIRM LIBRARIAN REGARDING MAPS OF LANDFILL AND TITLE SEARCH OF LANDFILL.

05/10/89 WWP 12.00 1,500.00
TRIAL IN RUTLAND; NEXT DAY PREPARATION.

05/10/89 RNB 10.30 824.00
ANALYZE BOUNDARIES OF CITY PROPERTY REGARDING LANDFILL; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HYDROGEOLOGICAL ANALYSES AND ELIMINATION OF H.O. WHEELER SCHOOL AS A SOURCE OF CONTAMINATION OF INTERVALE; FURTHER PREPARATION FOR CROSS-EXAMINATIONS OF WILLIAM COUNTRYMAN AND CRAIG HEINDEL; PREPARE FOR AND RESPOND TO ORAL MOTION TO DISMISS; ASSIST WITH CROSS-EXAMINATION OF WILLIAM COUNTRYMAN.

05/10/89 MJC 2.90 145.00
PREPARATION FOR TRIAL; CONFERENCE WITH FIRM LIBRARIAN REGARDING CITY

ASSESSOR'S MAP AND DEEDS TO LANDFILL; PREPARE EXHIBIT FILES AND INDEX; CONFERENCE WITH CITY ASSESSOR'S OFFICE REGARDING CERTIFICATION OF TAX MAP FOR USE AT TRIAL; CONFERENCE WITH ATTORNEY MILLER REGARDING ADMISSIBILITY OF SAME; DRAFT SUBPOENA FOR CITY MANAGER; TELEPHONE CONFERENCE WITH COURT.

05/11/89 WWP 10.00 1,250.00
TRIAL IN RUTLAND.

05/11/89 RNB 14.30 1,144.00
PREPARE FOR CROSS-EXAMINATION OF DR. SWIATOSLOV KACZMAR; PREPARE FOR AND ASSIST WITH CROSS-EXAMINATIONS OF MESSRS. LASH, HEINDEL, MOREAU AND GOODKIND.

5/11/89 MJC 1.80 90.00
SERVICE OF SUBPOENA ON WITNESS ROWLEY; ATTEMPTS TO LOCATE ROWLEY AT UVM AND PUBLIC WORKS DEPARTMENT; CONFERENCE WITH ROWLEY REGARDING DAGUE PROPERTY LINES; TELEPHONE CONFERENCE WITH ROWLEY REGARDING NEED TO TESTIFY.

05/15/89 RNB 9.80 784.00
DRAFT PLAINTIFFS' PROPOSED FINDINGS OF FACT WITH SUPPORTING CITATIONS TO TESTIMONY OF WITNESSES AND EXHIBITS; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING SUBMITTAL OF HIS BILL FOR DEPOSITION AND OTHER SERVICES.

05/16/89 RNB 5.80 464.00
REVIEW ALL EXHIBITS ADMITTED AT TRIAL; CONTINUE DRAFTING PLAINTIFFS' PROPOSED FINDINGS OF FACT; REVISE AND REORDER SAME.

05/17/89 RNB 0.30 24.00
LETTER TO ATTORNEY PEARSON REGARDING PLAINTIFFS' PROPOSED FINDINGS OF FACT.

05/18/89 RNB 4.80 384.00
REVIEW ALL PRIOR MEMORANDA OF LAW AND BRIEFS IN PREPARATION FOR DRAFTING TRIAL MEMORANDUM; REVIEW DR. REED'S MAY 15, 1989 LETTER AND INVOICES; LETTER TO ATTORNEY MCKEARIN REGARDING INVOICE FROM DR. REED FOR HIS DEPOSITION.

05/23/89 WWP 1.00 125.00
REVIEW DRAFT STATEMENT OF FACTS.

05/24/89 RNB 0.50 40.00
TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING PLAINTIFFS' EXHIBIT 67; LETTER TO ATTORNEY MCKEARIN REGARDING SAME.

05/30/89 RNB 1.10 88.00
REVIEW ATTORNEY HEMLEY'S MAY 25, 1989 LETTER REGARDING HIS REQUEST FOR COPIES OF STIPULATION OF FACTS AND PLANTIFFS' [SIC] REQUEST FOR FINDINGS; LETTER TO ATTORNEY HEMLEY REGARDING SAME; REVIEW ATTORNEY MCKEARIN'S MAY 26, 1989 LETTER; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING PLAINTIFFS' EXHIBITS.

05/31/89 RNB 0.40 32.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PLANTIFFS' [SIC] PROPOSED FINDINGS OF FACT, PLANTIFFS' [SIC] EXHIBITS, AND CITY'S REQUEST FOR STIPULATION REGARDING STATE'S LAWSUIT BROUGHT AGAINST CITY IN DECEMBER OF 1985.

06/01/89 RNB 8.80 704.00
TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING PLAINTIFFS' EXHIBIT 69 AND THE CITY'S REQUESTED STIPULATION REGARDING THE STATE'S LAWSUIT BROUGHT AGAINST THE CITY IN DECEMBER 1985; CONFIRMATION LETTER TO ATTORNEY MCKEARIN REGARDING SAME; BEGIN DRAFTING PLAINTIFFS' TRIAL MEMORANDUM, INCLUDING INTRODUCTION AND FIRST ARGUMENT REGARDING CITY'S VIOLATION OF SECTION 6925(A) OF RCRA.

06/02/89 RNB 4.50 360.00
CONTINUE DRAFTING PLAINTIFFS' TRIAL MEMORANDUM, INCLUDING ARGUMENT THAT CITY IS VIOLATING SECTION 6930(A) OF RCRA.

06/03/89 RNB 8.30 664.00
CONTINUE DRAFTING PLAINTIFFS' TRIAL MEMORANDUM, INCLUDING ARGUMENT THAT COURT CAN ENFORCE THE MINIMUM FEDERAL PROHIBITIONS OF SECTIONS 6925(A) AND 6930(A) OF RCRA AND ARGUMENT THAT THE CITY HAS OPERATED THE LANDFILL IN VIOLATION OF THE SAFETY CRITERION OF RCRA.

06/04/89 RNB 4.30 344.90
CONTINUE DRAFTING PLAINTIFFS' TRIAL MEMORANDUM, INCLUDING ARGUMENTS THAT THE CITY HAS VIOLATED THE SURFACE WATER AND GROUNDWATER CRITERIA OF RCRA.

06/05/89 RNB 6.50 520.00
CONTINUE DRAFTING PLAINTIFFS' TRIAL MEMORANDUM, INCLUDING ARGUMENT THAT THE CITY IS OPERATING THE LANDFILL WITHOUT LAWFUL AUTHORITY IN VIOLATION OF 42 U.S.C. SECTION 6945(A).

06/06/89 RNB 3.80 304.00
BEGIN DRAFTING ARGUMENT OF PLAINTIFFS' TRIAL MEMORANDUM THAT THE LANDFILL PRESENTS AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE ENVIRONMENT IN VIOLATION OF 42 U.S.C. SECTION 6972(A)(1)(B).

06/07/89 RNB 3.80 304.00
COMPLETE ARGUMENT OF TRIAL MEMORANDUM THAT THE PAST AND PRESENT DISPOSAL OF HAZARDOUS AND SOLID WASTES AT THE LANDFILL PRESENTS AND [sic] IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE ENVIRONMENT IN VIOLATION OF 42 U.S.C. SECTION 6972(A)(1)(B); EDIT AND PROOFREAD TRIAL MEMORANDUM TO DATE.

06/08/89 RNB 7.80 624.00
DRAFT ARGUMENT OF TRIAL MEMORANDUM THAT THE CITY HAS VIOLATED THE CLEAN WATER ACT.

06/09/89 RNB 0.80 64.00
DRAFT ARGUMENTS OF TRIAL MEMORANDUM THAT CITY IS VIOLATING VERMONT

GROUNDWATER PROTECTION LAW AND THAT PLAINTIFFS' CLAIMS UNDER RCRA AND THE CWA ARE NEITHER PREEMPTED NOR MOOT.

06/12/89 RNB 1.80 144.00
PROOFREAD AND EDIT PLAINTIFFS' TRIAL MEMORANDUM; BRIEF TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PLAINTIFFS' PROPOSED FINDINGS OF FACT AND TRIAL MEMORANDUM; LETTER TO ATTORNEY PEARSON REGARDING SAME.

06/14/89 RNB 5.80 464.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO TRIAL MEMORANDUM; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO PLAINTIFFS' PROPOSED FINDINGS OF FACT; DRAFT CONCLUSIONS AND RELIEF REQUESTED SECTION OF TRIAL MEMORANDUM; REVISE PLAINTIFFS' PROPOSED FINDINGS OF FACT AND TRIAL MEMORANDUM.

06/15/89 RNB 2.30 184.00
LETTER TO CLERK OF U.S. DISTRICT COURT IN RUTLAND REGARDING FILING OF PLAINTIFFS' PROPOSED FINDINGS OF FACT, TRIAL MEMORANDUM, CERTIFICATE OF SERVICE, TESTIMONY OF MESSRS. OGDEN AND DAGUE, AND PLAINTIFFS' EXHIBITS; DRAFT CERTIFICATE OF SERVICE; COMPILE PLAINTIFFS' EXHIBITS FOR FILING WITH THE COURT; FINAL PROOFREAD OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND TRIAL MEMORANDUM.

06/19/89 RNB 2.30 184.00
REVIEW AND ANALYZE DEFENDANT'S MOTION TO REOPEN THE EVIDENCE AND SUPPORTING MEMORANDUM OF LAW, DEFENDANT'S PROPOSED FINDINGS OF FACT, AND DEFENDANT'S PROPOSED CONCLUSIONS OF LAW AND SUPPORTING MEMORANDUM; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING DEFENDANT'S MOTION TO REOPEN THE EVIDENCE; LETTER TO ATTORNEY MCKEARIN REGARDING THE STATE'S COMPLAINT AGAINST THE CITY.

06/20/89 RNB 1.00 80.00
TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING HIS EXPERT WITNESS FEES; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING DR. REED'S FEE FOR HIS DEPOSITION; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DEFENDANT'S MOTION TO REOPEN THE EVIDENCE, PROPOSED FINDINGS OF FACT, AND TRIAL MEMORANDUM.

06-21-89 RNB 0.30 24.00
LETTER TO DR. FRANK REED REGARDING HIS EXPERT WITNESS FEE.

07-05-89 RNB 0.60 48.00
REVIEW AND ANALYZE DEFENDANT'S REPLY MEMORANDUM.

07-06-89 RNB 0.30 24.00
LETTER TO ATTORNEY PEARSON REGARDING CITY'S REPLY MEMORANDUM.

09-01-89 RNB 0.30 24.00
LETTER TO ATTORNEY MCKEARIN REGARDING DR. KACZMAR'S BILL FOR HIS DEPOSITION.

10-16-89 RNB 0.40 32.00
REVIEW ATTORNEY MCKEARIN'S 13 OCTOBER 1989 LETTER TO TO [sic] THE COURT REGARDING SUBMISSION OF DEFENDANT'S TRIAL EXHIBITS' CONFIRM ADMISSION OF THESE EXHIBITS.

10-18-89 RNB 6.30 504.00
THOROUGH REVIEW AND ANALYSIS OF JUDGE BILLINGS' FINDINGS OF FACT, OPINION AND ORDER; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; RESPOND TO NEWSPAPER AND TELEVISION INQUIRIES; CONFERENCE WITH ATTORNEY TUTTLE REGARDING PURSUIT OF PLAINTIFFS' COSTS OF LITIGATION, INCLUDING REASONABLE ATTORNEYS AND EXPERT WITNESS FEES, UNDER RCRA AND CWA; TELEPHONE CONFERENCE WITH CLERK OF COURT REGARDING ENTRY OF JUDGMENT.

10-18-89 ART 2.70 202.50
BEGIN ORGANIZATIONAL WORK ON BILL OF COSTS AND ATTORNEY FEES MOTION; REVIEW COURT'S ORDER DATED OCTOBER 17, 1989; BEGIN LEGAL RESEARCH REGARDING ATTORNEY FEES.

10-19-89 HB 2.20 264.00
RESEARCH REGARDING AWARD OF ATTORNEYS FEES.

10-19-89 RNB 0.80 64.00
CONFERENCE WITH ATTORNEY TUTTLE REGARDING LEGAL RESEARCH ON RECOVERY OF COSTS OF LITIGATION UNDER RCRA AND CWA.

10-19-89 ART 9.10 682.50
LEGAL RESEARCH REGARDING ATTORNEY FEES UNDER RCRA AND CLEAN WATER AND AIR ACTS.

10-19-89 AJG 0.30 13.50
CONFERENCE WITH ATTORNEY TUTTLE REGARDING SEARCH OF FILES TO ITEMIZE DISBURSEMENTS; EXAMINATION OF FILES.

10-20-89 HB 3.10 372.00
RESEARCH REGARDING RECOVERY OF FEES.

10-20-89 RNB 2.50 200.00
COMPILE AND ANALYZE LEGAL RESEARCH ON RECOVERY OF COSTS OF LITIGATION UNDER RCRA AND CWA; COMPILE RECEIPTS FOR DISBURSEMENTS INCURRED; CONFERENCE WITH ATTORNEY BRIGGS REGARDING LEGAL RESEARCH ON LOADSTAR AND MULTIPLIER; TELEPHONE CONFERENCE WITH DR. FRANK REED REGARDING JUDGE BILLINGS' DECISION.

10-20-89 ART 7.00 525.00
CONTINUE LEGAL RESEARCH REGARDING AWARDS OF ATTORNEY FEES UNDER RCRA AND CLEAN WATER ACT; SHEPARDIZE CASES.

10-20-89 AJG 1.80 81.00
CONTINUE REVIEW OF FILES FOR DISBURSEMENT RECEIPTS.

10-22-89 ART 1.00 75.00
LEGAL RESEARCH REGARDING ATTORNEY FEES UNDER RCRA AND CLEAN AIR ACT; BEGIN DRAFT MOTION FOR FEES.

10-23-89 HB 2.80 336.00
CONTINUE PREPARATION OF FEE APPLICATION AND ACCOMPANYING AFFIDAVITS.

10-23-89 RNB 8.70 696.00
TELEPHONE CONFERENCE WITH MRS. BETTY DAGUE REGARDING JUDGE BILLINGS' DECISION AND CITY'S RESPONSE TO MALFUNCTION OF METHANE GAS METER; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME, ANALYSIS OF JUDGE BILLINGS' DECISION, REQUEST FOR PLAINTIFFS' COSTS OF LITIGATION, AND SETTLEMENT; BEGIN REVIEW AND PROOFREAD DRAFT STATEMENT OF SERVICES.

10-23-89 ART 4.20 315.00
CONTINUE DRAFT MOTION FOR ATTORNEY FEES AND EXPENSES.

10-24-89 RNB 1.80 144.00
CONTINUE REVIEW AND PROOFREAD DRAFT STATEMENT OF SERVICES.

10-25-89 GSC 2.40 216.00
DETAILED LINE-BY-LINE REVIEW OF BILL FOR LEGAL SERVICES FROM 1985 TO PRESENT; REVIEW STANDARDS FOR ATTORNEYS FEES AWARDS AND ENHANCEMENT CRITERIA.

10-25-89 RNB 0.80 64.00
CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING STATEMENT OF SERVICES.

10-25-89 ART 1.70 127.50
REVISIONS TO MOTION FOR ATTORNEY FEES AND SUPPORTING MEMORANDUM.

10-26-89 RNB 4.30 344.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DRAFT STATEMENT OF SERVICES; TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME; LEGAL RESEARCH ON REQUIREMENTS GOVERNING COURT-AWARDED ATTORNEY FEES APPLICATIONS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME; REVISE PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS AND SUPPORTING MEMORANDUM.

10-26-89 ART 0.70 52.50
LEGAL RESEARCH AND ANALYSIS REGARDING CONTEMPORANEOUS TIME RECORDS REQUIREMENT; TELEPHONE CONFERENCE WITH ACCOUNTING REGARDING BILL.

10-27-89 RNB 3.30 264.00
ANALYZE REQUIREMENTS FOR COURT-AWARDED ATTORNEY FEES APPLICATIONS; CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING HOURLY RATES FOR SERVICES; CONTINUE TO REVISE MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS.

10-28-89 RNB 4.30 344.00
DRAFT AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; REVISE SAME; REVIEW RECEIPTS FOR EXPENSES.

10-29-89 RNB 3.80 304.00
REVISE AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; CONTINUE TO REVISE MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS.

10-30-89 RNB 4.30 344.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO APPLICATION AND AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; TELEPHONE CONFERENCE WITH ATTORNEY MELLO REGARDING AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; TELEPHONE CONFERENCE WITH ATTORNEY FURLONG REGARDING SAME; DRAFT AFFIDAVITS FOR ATTORNEYS MELLO AND FURLONG; TELEPHONE CONFERENCE WITH ATTORNEY EGGLESTON REGARDING AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; DRAFT AFFIDAVIT OF ATTORNEY EGGLESTON; THOROUGH REVIEW AND ANALYSIS OF PROPOSED ATTACHMENT TO

ATTORNEY PEARSON'S AFFIDAVIT; EDIT ATTORNEY PEARSON'S AFFIDAVIT.

198,027.50

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

October 30, 1989

MRS. ERNEST DAGUE
BURLINGTON, VT 05401

FILE NUMBER: 2369001

INVOICE NUMBER: 1

FOR THE PERIOD THROUGH October 30, 1989

DAGUE V. CITY OF BURLINGTON

William W. Pearson

01-01-89 - 12-31-89	142.50 HOURS AT 125.00 /HR	
	=	17,812.50
07-01-87 - 12-31-88	143.10 HOURS AT 115.00 /HR	
	=	16,456.50
07-01-86 - 06-30-87	86.80 HOURS AT 100.00 /HR	
	=	8,680.00
07-01-84 - 06-30-86	442.40 HOURS AT 85.00 /HR	
	=	37,604.00

Richard N. Bland

01-01-89 - 12-31-89	294.20 HOURS AT 80.00 /HR	
	=	23,536.00
07-01-87 - 12-31-88	215.60 HOURS AT 70.00 /HR	
	=	15,092.00

07-01-86 - 06-30-87	98.40 HOURS AT 65.00 /HR	
	=	6,396.00
01-01-85 - 06-30-86	661.50 HOURS AT 45.00 /HR	
	=	29,767.50

Michael J. Case

01-01-89 - 12-31-89	77.60 HOURS AT 50.00 /HR	
	=	3,880.00
07-01-89 - 12-31-88	97.50 HOURS AT 45.00 /HR	
	=	4,387.50
07-01-85 - 06-30-87	593.20 HOURS AT 40.00 /HR	
	=	23,728.00
07-01-84 - 06-30-85	67.50 HOURS AT 35.00 /HR	
	=	2,362.50

Paul H. Ode, Jr.

07-01-84 - 06-30-85	0.50 HOURS AT 55.00 /HR	
	=	27.50

Robert B. Luce

07-01-85 - 06-30-86	10.50 HOURS AT 60.00 /HR	
	=	630.00

Gregory S. Clayton

01-01-89 - 12-31-89	2.40 HOURS AT 90.00 /HR	
	=	216.00
07-01-85 - 06-30-86	0.50 HOURS AT 60.00 /HR	
	=	30.00

Heather Briggs

01-01-89 - 12-31-89	8.10 HOURS AT 120.00 /HR	
	=	972.00

John H. Tarlow

07-01-85 - 06-30-86	13.80 HOURS AT 45.00 /HR	
	=	621.00

Anita R. Tuttle

01-01-89 - 12-31-89	26.40 HOURS AT 75.00 /HR	
	=	1,980.00

Robert A. Miller

01-01-89 - 12-31-89	9.40 HOURS AT 70.00 /HR	
	=	658.00

01-01-88 - 12-31-88	21.60 HOURS AT 50.00 /HR =	1,080.00
Martha L. Judy 01-01-88 - 12-31-88	17.20 HOURS AT 30.00 /HR =	516.00
Anthony J. Gallucci 01-01-89 - 12-31-89	2.10 HOURS AT 45.00 /HR =	94.50
G. Larry Harvey 07-01-84 - 06-30-85	26.30 HOURS AT 35.00 /HR =	920.50
Wynne W. Browne 07-01-84 - 06-30-86	0.50 HOURS AT 30.00 /HR =	15.00
Joyce D. Servidio 01-01-85 - 06-30-86	6.70 HOURS AT 35.00 /HR =	234.50
David Lowy 01-01-86 - 12-31-87	11.00 HOURS AT 30.00 /HR =	330.00
TOTAL SERVICES RENDERED		$ 198,027.50

RNB /RNB

Not reproduced are 83 pages of original documentation (invoices, receipts, etc.) of expenses and disbursements totalling $10,929.66, the amount of which is not disputed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

AFFIDAVIT OF MICHAEL G. FURLONG

Michael G. Furlong, being duly sworn, deposes and states the following:

1.

I am a partner in the law firm of Sheehey Brue Gray & Furlong in Burlington, Vermont. I graduated from Middlebury College (B.A., 1973) and Cornell University (J.D., 1978), and I have been in practice in Burlington since 1978.

2.

Having practiced law in Burlington, Vermont for approximately eleven years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

The customary billing rates for the attorneys in our firm range from $90 to $120 per hour. My customary billing rate is $120 per hour.

4.

I understand that the current billing rate charged by William W. Pearson is $125 per hour, and that charged by Richard N. Bland is $80 per hour, and that the billing rates for other attorneys in the firm of Downs Rachlin & Martin range from $60 to $150 per hour, depending upon the level of experience.

Based upon my own firm's billing practices and hourly rates, and my general knowledge of the fees customarily charged by other attorneys in Burlington, Vermont, I believe that the hourly rates charged by attorneys in the firm of Downs Rachlin & Martin are within the range of hourly rates charged by other attorneys in the Burlington area.

5.

Our firm engages in the general practice of law, with a majority of our work involving business and commercial matters.

Our firm does not do extensive plaintiffs' work on a contingency fee basis. When we do so, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return to the firm more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Michael G. Furlong
Michael G. Furlong

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 30th day of October, 1989.

/s/ David T. Austin
Notary Public
Commission Expires: 2-10-91

B3/31.1030

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

AFFIDAVIT OF ROBERT A. MELLO

Robert A. Mello, being duly sworn, deposes and states the following:

1.

I am an attorney in South Burlington, Vermont. I graduated from St. John's Seminary in 1968 and Boston College (J.D., 1971), and I have been in practice in the Burlington area since 1975.

2.

Having practiced law in Burlington, Vermont for approximately 14 years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

My customary billing rate for fee-paying clients is $95-$115 per hour.

4.

I am professionally and personally acquainted with William W. Pearson and Richard N. Bland and the law firm of Downs Rachlin & Martin, and I believe them to possess a high degree of knowledge and expertise in the field of environmental law.

5.

I understand that the current billing rate charged by Mr. Pearson is $125 per hour, and that charged by Mr. Bland is $80 per hour, and that the billing rates for other attorneys in the firm of Downs Rachlin & Martin range from $60-$150 per hour, depending upon the level of

experience. I also understand that the billing rates for legal assistants in the firm of Downs Rachlin & Martin range from $30-$50 per hour, depending upon the level of experience.

Based upon my own hourly rate, and my general knowledge of the hourly rates charged by other attorneys and legal assistants in the Burlington area, I believe that the hourly rates charged by the law firm of Downs Rachlin & Martin are within the range of hourly rates charged by other law firms in the Burlington area.

6.

I engage in the general practice of law. When I take on plaintiffs' work on a contingency basis, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Robert A. Mello
Robert A. Mello

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 30th day of October, 1989.

/s/ Joanne Aja Simpson
Notary Public
Commission Expires: 2-10-91

B3/31.1030

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

AFFIDAVIT OF JON R. EGGLESTON

Jon R. Eggleston, being first duly sworn, deposes and states the following:

1.

I am a duly licensed attorney admitted to practice in Vermont. I received my B.A. from the University of Denver in 1968, my J.D. from Cornell University in 1971 and an LL.M. in Taxation in 1975 from the Georgetown University Law Center. I am admitted to practice before the U.S. District Court for the District of Vermont.

2.

I am a partner in the firm of Miller, Eggleston & Rosenberg in Burlington, Vermont and am engaged in general corporate law and taxation.

3.

Having practice law in Vermont since 1971, I am familiar with hourly rates charged by law firms and attorneys in the Burlington area.

4.

I personally charge clients at the rate of $150 per hour.

5.

Based upon my own hourly rate, and my knowledge of the fees customarily charged by attorneys in this community, I believe that the current hourly rates charged by William W. Pearson and Richard N. Bland, $125 per hour and $80 per hour, are reasonable hourly rates for the Burlington legal market.

6.

My firm seldom represents plaintiffs on a contingency fee basis. This is because a contingent fee which will be equal only to our usual hourly rates offers no incentive for taking on such work. Indeed, it is my belief, based on my knowledge and experience of the Burlington legal community, that lawyers who take such contingency cases expect to recover a multiple of their usual hourly rate if they were to prevail in the case. Without this

expectation, there is no incentive for taking a contingency case.

/s/ Jon R. Eggleston
Jon R. Eggleston

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 31st day of October, 1989.

/s/ Cathy A. Meilleur
Notary Public
Commission expires:

B3/31.1030

FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX
VOLUME II, PAGES 219-417

MICHAEL B. CLAPP*
ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont
05402-0988
Telephone: (802) 864-5751
Counsel for Petitioner

*Counsel of Record

WILLIAM W. PEARSON*
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue
Suite 2100
Tucson, Arizona 85701
Telephone: (602) 620-5520
Counsel for Respondents

Petition for Certiorari Filed November 18, 1991
Certiorari Granted January 27, 1992

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OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

1. Docket Entries 1
2. Plaintiffs' Complaint filed October 9, 1985, included in Appendix to Petition for Certiorari at pp. 244-269
3. Opinion and Order of United States District Court for the District of Vermont, March 26, 1986, included in Appendix to Petition for Certiorari at pp. 44-53
4. Opinion and Order of Second Circuit Court of Appeals, August 20, 1986, included in Appendix to Petition for Certiorari at pp. 142-144
5. Findings of Fact, Opinion and Order of United States District Court for the District of Vermont, October 17, 1989, included in Appendix to Petition for Certiorari at pp. 59-115
6. Plaintiffs' Application for Attorney's Fees and Costs November 1, 1989 5
7. Memorandum in Support of Application for Fees and Costs, November 1, 1989 7

Volume II

8. Memorandum in Opposition to Application for Fees and Costs, November 13, 1989..... 219
9. Reply Memorandum in Support of Application for Fees and Costs, November 24, 1989 ... 230
10. Supplemental Memorandum in Opposition to Application for Fees and Costs, December 8, 1989 236

TABLE OF CONTENTS – Continued

Page

11. Reply Memorandum in Support of an Award of Fees and Costs, January 3, 1990 282

12. Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990, included in Appendix to Petition for Certiorari at pp. 130-134

13. Petition for Enforcement of Order, April 17, 1990 284

14. Memorandum in Opposition to Plaintiff's Petition for Enforcement of Order, April 27, 1990 287

15. Plaintiffs' Response to Defendant's Opposition to Enforcement of Court Order, May 1, 1990 289

16. Order of the United States District Court for the District of Vermont, May 4, 1990 296

17. Judgment of United States District Court for the District of Vermont, May 7, 1990, included in Appendix to Petition for Certiorari at pp. 116-117

18. Opinion of Second Circuit Court of Appeals, June 12, 1991 included in Appendix to Petition for Certiorari at pp. 1-37

19. Plaintiff's Bill of Costs, June 25, 1991 302

20. Order of Second Circuit Court of Appeals, August 20, 1991 included in Appendix to Petition for Certiorari at pp. 145-146

21. Supplemental Application for Attorney's Fees and Costs, June 25, 1991 311

TABLE OF CONTENTS – Continued

Page

22. Application to Second Circuit Court of Appeals for Attorney's Fees and Costs, June 25, 1991 362

23. Order of United States District Court for the District of Vermont, October 11, 1991, included in Appendix to Petition for Certiorari at pp. 137-138

24. Order of Second Circuit Court of Appeals, October 25, 1991, included in Appendix to Petition for Certiorari at pp. 38-39

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs request an award of $406,984.66 for all fees, costs and expenses incurred in the prosecution of this action. The total amount is comprised of $7,295 for expert witness fees, $3,634.66 for attorney expenses and a lodestar award of $198,027.50 for which they request a 100% enhancement.

Defendant opposes Plaintiffs' request and contends that the relief obtained and the extent to which the Plaintiffs prevailed in this action do not justify or provide legal support for the lodestar award or the costs Plaintiffs seek. In addition, the enhancement requested by the Plaintiffs is foreclosed by a decision of the United States Supreme Court.

I. The Extent To Which The Plaintiffs Prevailed And The Relief Obtained Do Not Entitle The Plaintiffs To The Award Of Fees And Costs That Has been Requested

Plaintiffs' ten-count Complaint sought detailed and comprehensive prohibitory and mandatory injunctive

relief, imposition of civil penalties, compensatory and punitive damages,[1] costs and attorney's fees. When the action was commenced in October of 1985, Plaintiffs were seeking a preliminary injunction calling for immediate closure of the Defendant's landfill. They also sought the imposition of specific monitoring and remediation requirements.[2]

A determination of the extent of the Plaintiffs' success in the case necessarily entails a comparison of the the [sic] relief obtained with the relief sought. As the United States Supreme Court held in *Hewitt v. Helms*, 482 U.S. 755, 96 L.Ed.2d 654, 107 S. Ct. 2672 (1987), "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 96 L.Ed.2d 661. Further explication of the meaning of relief was provided by the Court in *Rhodes v. Steward*, 488 U S ___, 102 L.Ed.2d 1, 109 S Ct ___,

---

[1] Compensatory and punitive damages were sought in connection with Plaintiff's pendant state claims. Those claims were severed from the claims of federal and state statutory violations and are to be tried at a later date. The Citizen's Suits provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 and the Clean Water Act ("CWA") 33 U.S.C. § 1365, do not provide for awards of compensatory or punitive damages; and the State of Vermont's Ground Water Protection Act does not provide for an award of attorney's fees. Therefore, with respect to the issue of the relief obtained by the Plaintiffs, the inquiry is limited to the request for injunctive relief and imposition of civil penalties under RCRA and the CWA.

[2] The exact relief requested is set forth on pages 24 through 26 of Plaintiffs' Complaint. Those pages are attached as Appendix A to this Memorandum.

(1988). There the Court was dealing with an issue of attorneys fees under 42 U.S.C. §1988, in a case where, prior to the entry of judgment by the District Court, one of the plaintiffs died and the other was released from prison. As a result, the Supreme Court held, their claims of denial of due process concerning a magazine subscription were rendered moot. The Court went on to hold that a declaratory judgment would constitute relief only if "it affects the behavior of the defendant towards the plaintiff." *Id.* at 102 L.Ed.2d, 6. Because the case was moot before judgment issued, the judgment afforded no relief even though it declared that the defendant had not afforded the plaintiffs the proper procedural and substantive due process protections. Therefore plaintiffs were not entitled to recover attorneys fees.

Similarly in the case at bar, although this Court reached legal conclusions favorable to the Plaintiffs, the Opinion and Order did not "affect the behavior of the defendant towards the plaintiff." *Id.* This is not to say that the Court's Orders do not require anything of the Defendant. Certainly they do. But, what is required was either already done before the Order was entered or was something that the Defendant was already obligated to do under orders of the State of Vermont. The Defendants behavior toward the Plaintiffs insofar as this case is concerned, was mandated by the State and left unaltered by this Court's Orders.

With regard to the injunctive relief, the Plaintiffs requested injunctions requiring nine specific actions or cessations of actions (see Appendix A); and this Court

issued orders requiring the Defendant to undertake certain corrective actions and to close the landfill. Specifically, the Court ordered that the Defendant install and make operational by May 26, 1986, a methane gas control system and a leachate collection system (Opinion and Order dated March 26, 1986); and that the landfill be closed down by January 1, 1990 (Opinion and Order dated October 16, 1989).

While those Orders may relate to the relief requested by the Plaintiffs in paragraphs A, E and F of Plaintiffs' request for relief, they obligated the Defendant to do only what it was already required to do under orders issued by the State which, in turn, was authorized by EPA to implement RCRA in Vermont. Additionally, in the case of the March 26, 1986 Order, the work that was the subject of that Order had already been completed, albeit behind schedule, under compulsion of the January 31, 1985 Assurance of Discontinuance and an action brought in Chittenden Superior Court by the State of Vermont to enforce the Assurance.

It is true that relief need not be judicially decreed to justify an award of attorney's fees; and a law suit may prompt voluntary action on the part of the Defendant providing the relief sought by the Plaintiffs, *Hewitt v. Helms, supra*. However, in the case at bar there is no evidence that the conduct of the Defendant, to the extent that it provided the relief Plaintiffs were after, was a product of Plaintiffs' lawsuit. Instead, as the record shows, Defendant's efforts to improve its landfill were the result of the State's enforcement efforts and the Defendant's efforts to comply with the State's orders. With regard to the closure of the landfill, there can be no

question but that even if this Court's Order had not imposed a January 1, 1990 deadline, the Defendant would have still been required to close the landfill to meet the deadline imposed by the State. And, importantly, the Defendant has not presented any argument, against closing the landfill on that date, nor has it otherwise attempted to avoid its obligation to do so.

For these reasons, consistent with the holdings of the United States Supreme Court, Defendant contends that the Plaintiffs are not entitled to an award of attorneys fees.

II. The Lodestar Amount Requested is Too High.

Even if it is assumed that the Plaintiffs are entitled to recover some attorneys fees, by requesting an award for what purports to be *all* of the time expended on the case, Plaintiffs evidence ignorance of the standards established by the very opinions they cite. In both *Copland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) and *Sierra Club v. E. P. A.*, 769 F.2d 796 (D.C. Cir. 1985) the courts held that the lodestar award should not reflect unproductive time or time spent litigating claims upon which the party was unsuccessful. Partial or limited success should not be fully compensated.

In the case at bar, the Plaintiffs have met with a number of failures: they did not obtain a preliminary injunction requiring the immediate closure of the landfill; they were not successful in their claims that RCRA's permitting and notification requirements applied to defendant's landfill; they were not successful in seeking

to have the landfill declared an open dump; and, they were not successful in obtaining the relief requested in paragraphs A, B, C, D, G, H, I, J, L, or M of the Complaint (see Appendix A). Their total for fees also appears to include time spent in the unsuccessful appeal of this Court's March 26, 1986 Order to the Second Circuit Court of Appeals and time spent on the pendant state claims, for which no fees may be awarded.

If the Plaintiffs could be said to have achieved success by obtaining the two Court Orders, it was cumulative of the success the State and the City had already achieved in connection with the management of the landfill.

Because the Plaintiffs have achieved, at most, only partial success, Defendants request an opportunity to engage in discovery of Plaintiffs' counsel concerning the allocation of the time they represent has been spent on various aspects of the case. Defendant also requests a hearing before this Court on the question of Plaintiffs' attorney's fees. Any award of attorney's fees should be limited by the extent of plaintiffs' success. *Hensley v. Eckerhart*, 461 U. S. 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983).

III. Enhancement of the Attorneys Fee Award is Improper

Plaintiffs also seek a 100% enhancement of their legal fees citing, *inter alia*, *Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711, 97 L.Ed.2d 585, 107 S. Ct. 3078 (1987). However, in *Delaware Valley* the Supreme Court held that enhancements should *not* be awarded. Writing

for the majority Justice White observed that the reasonable hourly rate for a reasonable number of hours worked would "automatically" take into account any issues such as complexity and difficulty of the case. He wrote: "any further increase in this sum based on the risk of not prevailing would result not in a 'reasonable' attorney's fees, but in a windfall for an attorney who prevailed in a difficult case." *Id.* at 97 L.Ed.2d 599.

The Court in *Delaware Valley* did not close the door completely on fee enhancements; but it did clearly state that they were to be the exception rather than the rule. Accord, *Blum v. Stenson*, 465 U. S. 886, 79 L.Ed. 2d 891, 104 S. Ct. 1541 (1984). The Court held that even in the exceptional case where an enhancement was, in the informed discretion of the trial court, appropriate, the enhancement would be limited to 1/3 of the lodestar award.

Plaintiffs' request for any enhancement should be denied under the authority of the Supreme Court's holding in *Delaware Valley*.

CONCLUSION

Defendants oppose Plaintiffs' request for payment of attorney's fees and other expenses. Plaintiffs' degree of success was insufficient to support any award inasmuch as they did not obtain any new relief from or against the City; at best the Plaintiffs achieved only partial success and therefore would be entitled to only a partial award of the fees and expenses; in the event of a partial award, discovery and hearing will be necessary to fix the proper

amount of the award; and finally, no enhancement of the lodestar amount should be granted.

Dated at Burlington, Vermont this 13th day of November, 1989.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.

APPENDIX A

COUNTY X - UNCOMPENSATED TAKING

110. Plaintiffs incorporate by reference paragraphs 2 through 109 of this Complaint.

111. This count is brought under Chapter I, Article 2nd, of the Vermont Constitution to recover just compensation for the Defendant's partial taking of Plaintiffs' property.

112. The health hazards and environmental damage created by the Defendant's operation of the Landfill have substantially diminished the value and use of Plaintiffs' property and, as such, constitute a partial taking of Plaintiffs' property, for which Plaintiffs are entitled just compensation under Chapter I, Article 2nd, of the Vermont Constitution.

RELIEF

WHEREFORE, Plaintiffs request the Court to provide the following relief:

A. Issue a preliminary and permanent injunction which would, at a minimum, order Defendant to:

1) Immediately cease its acceptance of hazardous, solid or any other waste of any kind;

2) Cease the unlawful discharge of hazardous and toxic pollutants into the groundwater beneath and around the Landfill and into the surface waters of the Intervale;

B. Issue an Order directing Defendant to present to the Court within 30 days a plan to excavate and properly dispose of hazardous wastes in the Landfill;

C. Issue an Order directing Defendants not to alter any part of the Landfill without the prior approval of a court-appointed monitor (paid for by Defendant);

D. Issue an Order directing Defendant to present to the Court within 30 days a plan to purge the hazardous and toxic materials from the groundwater beneath and around the Landfill and from the surface waters of the Intervale;

E. Issue an Order to install and thereafter continuously operate a leachate collection drain system;

F. Issue an Order directing Defendants to present to the Court within 30 days a methane gas control and abatement plan to remove all possibility of a methane gas explosion on or near Plaintiffs' property and that of other affected property owners.

G. Issue an Order directing Defendant to report monthly to the court-appointed monitor;

H. Issue an Order directing Defendant to permit the court-appointed monitor to oversee Defendant in Defendant's implementation of corrective measures;

I. Issue an Order directing Defendant to obtain and file a bond or equivalent security with the Court;

J. Impose upon Defendant civil penalties pursuant to 42 U.S.C. § 6928(g) and 33 U.S.C. § 1319(d);

K. Award Plaintiffs all costs of litigation, including reasonable attorney and expert witness fees, pursuant to 42 U.S.C. § 6922(e) and 33 U.S.C. § 1365(d);

L. Award Plaintiffs the sum of $500,000.00 in compensatory damages, and the sum of $500,000.00 in punitive damages;

M. Issue an Order to restore the Plaintiffs' property to its original condition prior to the methane gas exploration.

N. Issue an Order that this Court retain jurisdiction to supervise the carrying out of any order entered by the Court concerning the remedial action to be taken by Defendant; and

O. Any other relief as the Court may deem equitable, just and proper.

Burlington, Vermont. 9 October 1985.

DOWNS RACHLIN & MARTIN

By: William K. Pearson
William K. Pearson
Attorney for Plaintiffs
100 Dorset Street
P.O. Box 190
Burlington, Vermont 05402
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF FEES AND COSTS

In its opposition to Plaintiffs' request for fees and costs, Defendant claims: (1) Plaintiffs should get nothing because they did not really prevail in this action; (2) Plaintiffs should receive only a partial award because they achieved only partial success; and (3) enhancement of the lodestar is "foreclosed" by a decision of the United States Supreme Court. There is no merit to any of these claims.

I. THIS COURT HAS ALREADY DETERMINED THAT PLAINTIFFS HAVE SUBSTANTIALLY PREVAILED ON THEIR STATUTORY CLAIMS.

Defendant first challenges this Court's determination "that Plaintiffs have substantially prevailed in both their RCRA and CWA claims." It contends that Plaintiffs' success was so limited or insufficient to justify any award of fees and costs. According to Defendant, the extent of

Plaintiffs' success should be determined solely by comparing the relief obtained with the relief sought: it does not matter (to Defendant) that this Court found Defendant liable on four of the five statutory counts of Plaintiffs' Complaint.[1]

Moreover, to suggest (as Defendant does) that this Court's Orders of March 26, 1986 and October 16, 1989 are merely superfluous to what it was already required to do under orders of the State of Vermont not only is audacious but flies in the face of a record replete with Defendant's non-compliance with one (extended) deadline after another in a series of Assurances of Discontinuance – the first of which dates back to December 15, 1981.[2]

In short, the Court has twice rejected Defendant's mootness argument. The Court has also determined that Plaintiffs have substantially prevailed on their statutory claims, and are entitled to their "costs of litigation" under 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

---

[1] If Defendant truly means what it says, it would not have wasted valuable judicial resources by vigorously contesting its statutory liability over the past four years, but would have simply consented to judgment on its liability under RCRA and the CWA.

[2] A review of the transcript of the emergency meeting held on Tuesday evening, November 14, 1989, between the City's Mayor, Board of Aldermen, and City Attorney, for example, reveals just how Defendant's conduct has been altered by this Court's Order of October 16, 1989. (Plaintiffs will file a copy of the transcript when it becomes available to the public – in about a week).

II. DEFENDANT'S GENERALIZED OPPOSITION IS INSUFFICIENT TO REDUCE THE LODESTAR.

Defendant next contends that even if Plaintiffs did prevail, the lodestar requested is too high. Defendant's opposition to Plaintiffs' fee request, however, is notable for what it does *not* contain, namely any specific objections to either the reasonableness of the rates charged or hours expended by Plaintiffs' attorneys. Defendant's failure to specify particular hours it believes to be excessive precludes it from contesting the lodestar amount, since generalized objections are an inadequate basis for such reduction. *Stokes v. City of Montgomery, Ala.*, 706 F.Supp. 811 (M.D. Ala. 1989).

Indeed, Plaintiffs submit that Defendant has, in effect, conceded that both the rates and hours spent are reasonable. Rather, Defendant argues only that Plaintiffs' success is partial or limited, at best, and asserts that they should not be awarded fees for their "failures."[3] Defendant overlooks *Dominic v. Consolidated Edison Co.*, 822 F.2d 1249 (2d Cir. 1987) and its holding that, when the issues are so intertwined factually, a fully compensatory fee

---

[3] In its opposition, Defendant requests "an opportunity to engage in discovery of Plaintiffs' counsel concerning the allocation of the time they represent has been spent on various aspects of the case." With all due respect, Defendant has had the opportunity to review the 87 pages of Exhibit 1 attached to Plaintiffs' Application for Award of Fees and Costs. Such documentation makes clear that there is no need for discovery prior to any fee award and, indeed, such evidentiary proceedings have been met with disfavor by the courts. See *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980); *Konczak v. Tyrrell*, 603 F.2d 13, 19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1987).

award is justified even where a plaintiff did not prevail on all of his claims. *See United States Football League v. National Football League*, 887 F.2d 408, 58 U.S.L.W. 2257 (2d Cir. Oct. 10, 1989) (court held it was not error to include in the lodestar determination time spent on antitrust allegations dismissed prior to trial and other unsuccessful claims; "development of factual allegations and theories to support a claim is part of the normal litigation process and should be compensable.")

Thus, it is well-settled that a fee request should not be reduced or enhancement denied by mere application of a mathematical formula in which the total number of issues are blindly compared to the number of issues prevailed upon. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 1940-41 n.11 (1983). Here, there should be no "artificial distribution" of attorney time between the successful and unsuccessful claims, as all the issues involved a "common core of facts" and were "based on related legal theories." *Dominic*, 833 F.2d at 1259.

III. THE REQUESTED LODESTAR SHOULD BE ENHANCED.

Finally, Defendant contends that any enhancement of the lodestar is improper, citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S.Ct. 3078 (1987) (*Delaware Valley II*). The United States Supreme Court recently affirmed, however, enhancement of reasonable hourly rates for the delay in payment of attorneys' fees. *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989) (an enhancement for delay in payment of a statutory fee award against a state governmental entity is permissible).

Since *Delaware Valley II*, numerous courts have also enhanced lodestar amounts based on a contingent fee arrangement between plaintiffs and their counsel. *See, e.g., Stokes v. City of Montgomery, Ala.*, 706 F.Supp. 811 (M.D. Ala. 1989) (court enhanced the lodestar 100 percent); *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1986) (100 percent multiplier affirmed); *see also Palmer v. Shultz*, 679 F. Supp. 68 (D.D.C. 1988) (100 percent enhancement affirmed). Lastly, there is simply no support whatsoever that in a case such as this the enhancement is limited as a matter of law to one-third of the lodestar. *Stokes, Fadhl* and *Palmer, supra*.

Plaintiffs submit that this is an appropriate case for a fee enhancement.

CONCLUSION

Plaintiffs' Application for Award of Fees and Costs is unchallenged on any specific grounds by Defendant. Accordingly, this Court should award Plaintiffs a lodestar amount of $198,027.50, which fee should be doubled, together with an award of $7,295.00 for expert witness fees and $3,634.66 for expenses incurred in this action.

Plaintiffs further request that this Court order Defendant to pay Plaintiffs forthwith their "costs of litigation" under 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d), to ensure that Defendant does not prevail by conducting an economic war of attrition. To do otherwise will discourage other private attorneys general from engaging in public interest litigation to enforce the very statutes this

Court has already determined Defendant to have violated.

Burlington, Vermont. 22 November 1989.

DOWNS RACHLIN & MARTIN
Attorneys for Plaintiffs

By: Richard N. Bland
Richard N. Bland
William W. Pearson
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,	)	
ERNEST DAGUE, JR.,	)	
BETTY DAGUE AND	)	
ROSE A. BESSETTE	)	Civil Action
	)	No. 85-269
v.	)	
CITY OF BURLINGTON	)	

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

RCRA and the Clean Water Act each provide that if a party substantially prevails in the case, a court may award attorney's fees as appropriate (42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d)). Consequently, the threshold issue in this case with respect to the award of attorney's fees is whether or the Plaintiffs have substantially prevailed[1] in the lawsuit. Although this Court has stated in its Opinion and Order dated October 16, 1989, "that

[1] The requirement in RCRA and the Clean Water Act that the fee seeking party "substantially prevail" suggests a more exacting standard than applies in cases governed by the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. That Act uses only the term "prevailing" and not the term "substantially prevailing." In the cases that have applied that act and standard, it has been held that the party must show that they received "at least *some relief on the merits*" of the claim before they can be said to prevail. (*Hewitt v. Helms*, 482 U.S. 755, 759, 96 L.Ed.2d 654, 661, 107 S. Ct. 2672 (1987), (emphasis added). If some relief establishes a status as a prevailing party, presumably substantial relief must be obtained to be characterized as a substantially prevailing party.

Plaintiffs have substantially prevailed in both their RCRA and CWA claims," Defendant, City of Burlington, respectfully submits that even though the Court may have concluded that the Plaintiff prevailed on a majority of the legal issues in the case, nevertheless, the Plaintiffs have not "substantially prevailed" as those terms have been interpreted in decisions concerning the award of attorney's fees.

It is clear that the Plaintiffs did not prevail completely. The Court held in favor of the Defendant on several issues and denied much, if not most, of the relief Plaintiffs had requested. The relief which was granted was, as Defendants have previously argued, identical to the obligations imposed on the City by the State of Vermont. In effect, this Court's opinion evidences the Court's approval of the measures and time table established by the State for closure of the City's landfill and for mitigating any adverse affect that the landfill might otherwise have on the environment.

It is equally clear that the extent to which a party may have prevailed is directly measured by the extent to which the party obtained relief. As the U.S. Supreme Court held in *Rhodes v. Stewart*, 488 U.S. ___ 102 L.Ed.2d 1, 109 S. Ct. ___ (1988) "in the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of fees." *Id.* at 102 L.Ed.2d 6.[2]

[2] The Court in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 92 L.Ed.2d 439, 106 S. Ct.

(Continued on following page)

Accepting, for the purposes of discussion at least, that in an environmental action relief need not be personal to the plaintiff or a class of plaintiffs, but may instead relate to a thing or a practice or activity of the defendant; nevertheless, to be considered prevailing, a party must still obtain some of the relief sought (in the case of Clean Air Act (42 U.S.C. 7604(d) or civil rights claims) or a substantial amount of the relief sought (in the case of Clean Water Act or RCRA claims). It is further submitted that, in keeping with *Rhodes v. Stewart* and *Hewitt v. Helms, supra,* the defendant's obligation with respect to the subject matter of the lawsuit must be changed by the lawsuit even if the defendant's obligations toward the plaintiff need not be directly affected. In this case the Defendant's obligation to the Plaintiffs or the subject matter of this lawsuit have not been changed by any orders of this Court.

During the period of time that this lawsuit has been pending (since its filing on October 9, 1985) the City of Burlington has undertaken the following activity with regard to the landfill.

1. Installation of the methane gas control system;
2. Installation of the leachate collection system; and
3. Preparation of the landfill for final closure.

(Continued from previous page)

3088 (1986) (Delaware Valley I) held that an award of attorney's fees under the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604(d) should be governed by the same principles of case law governing an award of fees under 42 U.S.C. § 1988.

While it is true that those same actions were the subject of orders issued by this Court and were within the scope of the relief sought by the Plaintiffs, the inquiry must not end here. The next question is whether the Plaintiffs' lawsuit (and hence this Court's Orders) were the cause in fact of those actions. *Child v. Spillane* 866 F.2d 691 (4th Cir. 1989) (an applicant must demonstrate that a casual connection exits between the relief obtained and the litigation), *Disabled in Action of Pennsylvania v. Pierce,* 789 F.2d 1016 (3rd Cir. 1986) (Case under the Rehabilitation Act of 1973 (29 U.S.C. § 794 and 42 U.S.C. § 1988; where case settled, plaintiff's lawsuit must be a material factor in prompting the defendant to afford relief) and *Posada v. Lamb County Texas,* 716 F.2d 1066 (5th Cir. 1983) (plaintiff's action under the Voting Rights Act, 42 U.S.C. 19731(e) was not a significant catalyst for and hence was not a cause in fact of the defendant's efforts to develop constitutionally adequate plans to protect minority voting rights; thus, attorney's fees not awarded.)

The chronology of events relevant to activities listed in items one, two and three above compel the conclusion that Plaintiffs' lawsuit was not the cause in fact of those activities. First, each of those three actions was mandated by the Assurance of Discontinuance dated January 31, 1985 and the March 1985 Order of the Chittenden Superior Court (Trial Exhibit 4). Second, the engineering and design work for the methane gas control system (MGCS) and the leachate collection system (LCS) were carried out by the engineering firm of O'Brien and Gere beginning in April of 1985 (see Affidavit of Steve Goodkind, see "Attachment A"). Third, final plans and specifications were completed by O'Brien and Gere by August, 1985.

Fourth, solicitation for bids on the installation on the MGCS and the LCS were sent out on September 5, 1985. Fifth, bids were received on October 5, 1985. Each of those activities or events occurred before the Plaintiffs commenced the instant action on October 9, 1985 and before the Plaintiffs gave notice to the City or any other entity that they were bringing the instant action (October 8, 1985).

Installation of the MGCS and LCS began on November, 1985. On December 18, 1985 the State brought suit against the City for missing the deadline for installation of the MGCS (12/2/85) and the LCS (9/2/85). The methane gas control system was operational on December 27, 1985, and both the leachate collection system and the methane control system were fully operational before March 26, 1986, the date of this Court's Order concerning Plaintiffs' request for preliminary injunctive relief.

Although the City had previously encountered delays and obtained extensions of deadlines or amendments to Assurances of Discontinuance, it cannot be presumed that but for the Plaintiffs' suit, similar extensions and delays would have occurred in this instance. *Posada v. Lamb County Texas, supra* (it could not be presumed that but for the plaintiff's actions, the Attorney General would not have complied with his legal duties). Furthermore, the fact that the City had obtained final engineering plans for the project and had solicited bids for the engineering work as well as the fact that the State was aggressively enforcing the state Court Order, all serve to rebut any suggestion that the Plaintiffs' case prompted the defendants actions.

In summary on this point, Defendant submits that the chronology of events pertaining to the landfill as they relate to and parallel the Plaintiffs' request for relief in the Orders of this Court demonstrate that the Plaintiffs' lawsuit did not function as a cause in fact of those events. In the words of the 5th Circuit Court of Appeals in *Posada*, "plaintiffs simply caught the train as it pulled out of the station." *Id.* at 1071.

PLAINTIFFS ACHIEVED LIMITED SUCCESS AT BEST

If this Court nevertheless concludes that a sufficient causal relationship exists between the lawsuit and the conduct of the Defendant pertaining to the landfill, Defendant contends that the Plaintiffs' success was not complete; and having obtained only limited success, Plaintiffs are only due payment of a limited amount of their attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983). The lodestar fee award requested by the Plaintiffs ($198,027.50) should be reduced by the deleting charges pertaining to:

1. The Plaintiffs' failed effort to obtain preliminary injunctive relief;

2. Plaintiffs' appeal of this Court's decision on the request for preliminary relief;

3. Time spent on the common law tort claims for damages;

4. Time spent on the State Groundwater Act claim, 10 U.S.C. § 1390, *et seq.*; and

5. Repetitive or unproductive time.

Plaintiffs' accounting of fees while detailed, does not allow for a completely accurate allocation of the time among these various areas. However, excerpts from Plaintiffs' time records which relate in whole or in part to these challenged areas are reproduced in "Attachment B." Although it may not be possible to determine all of the hours spent in each of the challenged categories, it is possible to establish a reasonably conservative minimum numbers of hours spent in each of those categories.

The first two categories (preliminary injunction work and work on the appeal) are more procedural categories than substantive. Defendant recognizes that the issues covered by those two categories are intertwined with and indeed are the same as the RCRA and CWA issues raised by the Complaint. Still, Plaintiffs were unsuccessful in both of those efforts and both of those efforts reflect work that was not only unsuccessful, but repetitious of other work done in the case. In that regard, Defendant points out that prior to commencing the lawsuit, one of Plaintiffs' counsel spent in excess of 100 hours researching the law. Such thoroughness may be commendable, but when it is performed by an attorney who professes to be experienced in the substantive areas involved in the suit (Bland Affidavit Section 6, Page 4), Defendant questions either the degree of experience claimed or the need for the amount of research done. It is inappropriate to require the Defendant to pay for the repetition of that research to the extent it was involved in the preliminary injunction effort and the ensuing appeal. Not only should the repetitious research in those two efforts be disallowed, but all time spent in both of those efforts should be disallowed, both because of the lack of success and because the effort

had to be repeated in preparation for the trial on Plaintiffs' request for permanent relief.

With respect to time spent on the pendant [sic] state claim for damages, Defendant assumes that attorney's fees for work done on those common law claims in preparation for the upcoming trial of that case will not be awarded. By the same token, to the extent that time spent on those pendant claims is identifiable from the Plaintiffs' time records, it should also be disallowed.

With regard to the state Groundwater Protection Act, inasmuch as that act does not allow for an award of attorney's fees, to the extent that the time devoted to that effort can be identified from Plaintiffs' time records, it should be disallowed.

Finally, with regard to other repetitive or unproductive time, for many of the activities on the case, three individuals were involved in doing the same thing. Attorneys Pearson, Bland and legal assistant Case were often all in attendance at depositions, and hearings, or all were engaged in review of the same memorandum or preparation of the same motion. In that regard, Defendant challenges the appropriateness of the charge for the time of legal assistant Case.

Further in that same category, Defendant challenges a portion of the time spent by Plaintiff in putting together their application for an award of attorney's fees. A total of 58.9 hours with charges of $4,709 expended in this effort is inordinate in light of the fact that Plaintiff's attorneys presumably have computerized billing and record keeping which should reduce to a minimum the amount of time necessary to compile the data pertaining

to attorney's fees, and in light of the fact that Plaintiffs' firm has had direct experience before this Court in seeking an award of attorney's fees and, therefore, should be well versed in the applicable law as well as presumable having done the requisite investigative work concerning reasonable attorney's fees for purposes of establishing the lodestar amount.

Defendant cites to *Dominic v. Consolidated Edison Company of New York, Inc.*, 822 F.2d 1249 (2nd Cir. 1987) and *U.S. Football League v. National Football League*, 887 F. 2d 408 (2nd Cir. 1989) as authority for their suggestion that no effort should be made to reduce the lodestar award due their limited success. In this argument, however, the Plaintiffs overlook the fact that unlike the age discrimination claim and the retaliatory discharge claim made by *Dominic*, or the antitrust claims in *U.S.F.L.*, Plaintiffs' RCRA claims concerning Defendant's notification and permit requirements were not inextricably intertwined with the other claims raised, nor are the Plaintiffs' common law claims of nuisance and trespass inextricably intertwined. Furthermore, deletion of the time spent on the preliminary injunction and the appeal does not entail an effort to draw a fine distinction between substantive issues. Rather, it simply requests disallowance of unsuccessful and repetitious efforts. Finally, Plaintiffs reliance on *Dominic* overlooks the instructions from *Hensley v. Eckerhart, supra*, that if there are related legal theories involving a common core of facts that are not susceptible of being delineated, the Court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* at 461 U.S. 424, 435, 76.Ed.[sic]2d 40, 51-52, 103

S. Ct. 1933, 1940 (1983). Therefore, if, due to the interrelatedness of the events and subject matter of various aspects of the lawsuit particular hours of work cannot be eliminated, nevertheless, the Court should reduce the hours reasonably expended on the overall litigation so that it reasonably relates to the relief obtained. In both *Dominic* and *U.S.F.L.* the Second Circuit recognized this obligation. This Court is similarly constrained.

Defendant also challenges Plaintiffs' request for payment of its fees at its current rates. The Second Circuit has held in *New York Association for Retarded Children v. Carey*, 711 F.2d 1136 (2nd Cir. 1983), that lodestar amount should be calculated at the historic rate, not the current rate. In that case, the Circuit Court also established the requirement that contemporaneous time records be maintained in order to support the lodestar award. To the extent that Attorney Pearson did not maintain contemporaneous time records for the period of April 1985 to October 1985 (see affidavit of Attorney Pearson paragraph 7, page 3), his fees should be disallowed entirely. And to the extent that the time spent on the request for attorney's fees includes time spent in an effort to reconstruction Attorney Pearson's time, that time should also be disallowed.

NO ENHANCEMENT SHOULD BE ALLOWED

Plaintiffs identify several factors which they contend justify an enhancement of their fee in this case. These factors are the risk and amount involved; the novelty of the issues raised and the difficulties in prosecuting the case; the undesirability of the case; the skill required; the

experience and ability of the attorneys; the preclusion from other employment by the attorneys because of the delay; and the delay and the results obtained, citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984), Plaintiffs Memorandum in Support of Plaintiffs' Application for Fees and Costs at p. 5. But, those are not the proper criteria for determining whether or how much of an enhancement may be appropriate.

Defendant acknowledges having erroneously characterized the opinion in *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 97 L.Ed.2d 585, 107 S. Ct. 3078 (1987), (Delaware Valley II) as a majority opinion rather than a plurality. Therefore, this Court is not bound to apply enhancement in the manner called for by the plurality. However, the Opinion of Justice O'Conner to which courts have subsequently looked for guidance in awarding enhancements, see, e.g., *Stokes v. City of Montgomery, Ala.*, 706 F.2d 811 (M.D. Ala. 1989), does not support an enhancement award based on the factors cited by the Plaintiff. Justice O'Conner expressly agreed with the plurality that the legal risk of loss in a particular case would not support an enhancement. 483 U.S. 734, 97 L.Ed.2d 603. She also agreed the novelty of the issues raised or difficulties in prosecuting the case as well as the skill, experience and ability of the attorneys involved were all adequately compensated under the lodestar award. Justice O'Conner concluded that an enhancement is appropriate only to the degree that the relevant market compensates for contingency cases. The burden of proving that issue lies with the fee applicant. *Id.*

Assuming *arguendo* that an enhancement is appropriate in this instance, Plaintiffs have nevertheless failed to

meet their burden of establishing the degree of an enhancement because they have failed to establish the degree to which the relevant market compensates for contingency. The Affidavits of attorneys Michael G. Furlong, Robert A. Mello and Jon R. Eggleston are submitted in support of the Plaintiff's request. None of those attorneys professes to engage primarily in plaintiff's work. In fact, both Attorney Furlong and Attorney Eggleston state that their firms do little plaintiff's work. Each of the attorneys stated that when they do contingent work, the percentage of recovery is normally fixed at a level which would return more to the firm than would be charged at hourly rates; but none of the attorney's [sic] stated the degree to which their contingent return would exceed their hourly return. Therefore the plaintiffs have not established a basis for any contingency enhancement.

Without doubt attorneys hope to obtain a settlement or a damage award that results in a fee greatly in excess of their hourly rate. At times they succeed but in many instances the return is less. A contingency multiplier of the hourly rate based on what counsel in a particular market *hope* to see in contingent cases case [sic] can not logically support a request for enhancement by that same amount in all cases. Just as only some contingency cases actually yield a fee consistent with a high multiplier, only some "prevailing parties" prevail to the extent that a multiplier of the lodestar is appropriate. For the reasons set forth throughout this memorandum, the degree of success obtained by the plaintiff is insufficient to support a lodestar award, much less an enhancement of that award.

Plaintiffs also seek enhancement based on delay between the institution of the suit and its conclusion, a subject most recently addressed by the U.S. Supreme Court in *Missouri, et al. v. Jenkins*, ___ U.S ___, 105 L.Ed.2d 229, 109 S. Ct. 2463, 57 U.S. Law Week 4735. In *Jenkins*, the Court held that an adjustment for delay in payment based on current rather than historic hourly rates or otherwise is within the contemplation of the statute. The Court did not hold that it was required in all instances. On the facts of the case before it, the delay had resulted in a substantial hardship, the plaintiff's firm was small and it incurred $633,000 of debt to keep the firm running during the pendency of the suit. The Plaintiffs' firm in this case is not similarly situated. The firm is large and by all appearances prosperous. Based on the number of hours spent by Plaintiffs' counsel during the pendancy [sic] of this case, even as substantial as they were, each of the attorneys and other staff still had the overwhelming majority of their work time available for other clients. In these circumstances, Defendant submits that a delay enhancement is not only unnecessary, but inappropriate.

SUMMARY

An award of any attorneys fees in this case is inappropriate and contrary to the standards established for such an award in this Circuit and by the United States Supreme Court. Plaintiffs have not prevailed, much less have they substantially prevailed as those terms have been interpreted in the context of attorneys' fee cases. Alternatively, and if this court nevertheless finds that the plaintiffs have prevailed, defendant request [sic] that in

the exercise of its discretion this court reduce the plaintiff's lodestar figure by at least 75 percent to reflect the limited success obtained. Defendant requests that enhancement of the lodestar be denied. The burden of proof is on Plaintiffs as fee applicants, to establish their entitlement and the reasonable amount. They have not discharged those burdens.

Dated at Burlington, Vermont this 7th day of December, 1989.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.
Attorney for Defendant

McNEIL & MURRAY

By: /s/ _____
Nancy G. Sheahan, Esq.
Attorney for Defendant

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,	)	
ERNEST DAGUE, JR.,	)	
BETTY DAGUE AND	)	
ROSE A. BESSETTE	)	Civil Action
	)	No. 85-269
v.	)	
	)	
CITY OF BURLINGTON	)	

AFFIDAVIT OF STEVEN GOODKIND

I, STEVEN GOODKIND, being first duly sworn, hereby depose and state as follows:

1. My name is Steven Goodkind.

2. I am the City Engineer for the City of Burlington.

3. As such I have been directly involved with the operation of the City of Burlington's landfill. I have also been one of the primary technical representatives of the City of Burlington in its relations with the State of Vermont and private engineering firms.

4. In April of 1985, O'Brien & Gere Engineers were authorized to begin final design of the landfill leachate collection system and methane control system and capping.

5. In August of 1985, final plans and specs were received from O'Brien & Gere for the leachate collection and methane control systems.

6. Both systems were accepted by the State of Vermont as being designed to provide the level of control necessary to achieve compliance with the State Court Order of March, 1985, and the Assurance of Discontinuance.

7. On September 5, 1985, contracts for the leachate collection and methane control systems were sent out to bid.

8. The City executed contracts with Ralph B. Goodrich Company, Inc., on November 11, 1985, for installation of both systems.

9. The methane gas control system began operation on December 27, 1985, utilizing temporary blowers.

10. Installation of the complete, as designed, methane control system was in place and operating prior to March 26, 1985. Final inspection by the manufacturer occurred on March 25, 1986.

11. The leachate collection system began operations on January 15, 1986. On that date, the associated pump station, the function of which was to pump collected leachate to the wastewater treatment plant. Until the pump station was completed on March 6, 1986, collected leachate was trucked to the wastewater treatment plant.

12. The complete, as designed, leachate collection system was in place and operating as of March 7, 1986.

13. I am personally familiar with the design and selection of both systems and based on that familiarity, I can say that the suit by the Dagues, et al, had nothing to do with the decision to install the systems, the design of

the systems, or the decision on when they should be or were installed.

Dated at Burlington, Vermont this 7 day of December, 1989.

/s/ Steven Goodkind
Steven Goodkind

Sworn and subscribed to before me this 7th day of December, 1989.

Before me Alison Coburn
Notary Public

ATTACHMENT B

EXCERPTS FROM PLAINTIFFS' ATTORNEY'S FEES RECORDS

Sample Entry –

Date: Atty: Hours: Amount:
Description of Services:

04/11/85 MJC 4.4 154.00
Review landfill news articles; *photograph Dague property before excavation;* conference with clients regarding retainer agreements.

04/12/85 MJC 2.5 87.50
Conference with clients regarding revised retainer agreements; pick up City Attorney's letter regarding indemnification for excavation of Dague property.

04/15/85 MJC 3.0 105.00
Property inspection of City excavation for sewer pipe; draft memorandum regarding principals in case.

04/16/85 MJC 7.5 262.50
Property inspection during initial search for sewer pipe; photograph same; conference with clients and Street Department personnel regarding methane problem; report to Attorney Pearson regarding same.

04/17/85 MJC 7.5 262.50
Property inspection during renewed excavation for sewer pipe; photograph same; conference with Street Department officials and clients regarding same.

04/18/85 MJC 5.5 192.50
Continued property inspection during excavation of clients' land; additional photographing; conference with Street Department personnel and clients regarding same.

04/19/55 MJC 5.8 203.00
Further property inspection and photograph same; conference with Attorney Pearson regarding methane levels on Dague property; develop test form for client use.

04/29/85 MJC 1.0 35.00
Fact investigation at City Hall regarding finance board action.

05/03/85 MJC 1.8 63.00
Conference with Attorney Pearson and clients regarding claims against City and City's liability for damages to Dague property; photograph recent excavation and restoration of law.

06/10/85 MJC 2.7 94.50
Telephone conference with Ernie Dague, Jr. and Attorney Gretchen Bailey regarding status of City's replacement of clients' law; telephone conference with landscaping firms regarding feasibility of sodding and use; conference with clients regard [sic] same.

06/11/85 MJC 0.5 17.50
Analyze possible solution to grass-growing problem for clients.

06/13/85 MJC 0.6 21.00
Telephone conference with Attorney Gretchen Bailey regarding City's decision on clients' law; telephone conference with Betty Dague regarding same.

06/14/85 MJC 1.0 35.00
Telephone conference with Attorney Gretchen Bailey regarding City's decision on clients' law; memorandum to Attorney Pearson regarding same.

07/02/85 WWP 0.3 25.50
Analyze damages to clients' property

07/02/85 MJC 1.2 48.00
Referencing law restoration

07/09/85 MJC 1.0 40.00
Referencing damage to Dague lawn.

07/17/85 MJC 1.2 48.00
Inspection of Dague property concerning law problems (including Attorney Pearson).

10/06/85 RNB 4.3 193.50
Continue to revise Complaint, including sections on Plaintiffs' injuries and Count VIII on uncompensating taking; conference with Attorney Pearson regarding same.

10/10/85 RNB 0.9 40.50
Preparation for preliminary injunction hearing.

10/11/85 MJC 2.5 100.00
Preparation for hearing on Motion for Preliminary Injunction.

10/14/85 RNB 7.2 324.00
Legal research on case law and commentary under RCRA and CWA; *Interview with Donald R. Bessette regarding his mother joining lawsuit;* conference with Attorney Pearson regarding need for methane gas expert and expert on endangerment present by landfill.

10/14/85 MJC 5.3 212.00
. . . conference with Attorney Pearson in preparation for preliminary injunction hearing; . . . conference with Mr. Bessette regarding nuisance and methane gas claims and possibility of his mother joining lawsuit as Plaintiff.

10/14/85 WWP 3.5 297.50
Interview Mr. Bessette; draft retainer agreement; read notification regulations; identify experts for affidavits; review Complaint for factual basis.

10/15/85 RNB 6.2 279.00
Legal research of case law and legislative history of RCRA and CWA for preliminary injunction hearing; . . . further preparation for hearing.

10/15/85 MJC 0.8 32.00
. . . conference with Attorney Pearson regarding organization of file in preparation for hearing and further investigation in preparation for hearing.

10/16/85 RNB 3.7 166.50
Legal research on requirement of security for the issuance of a preliminary injunction. . . .

10/16/85 MJC 4.0 160.00
Interview Don and Rose Bessette at Mrs. Bessette's home; investigation of methane gas migration there; compile and sent expert materials to experts.

10/17/85 RNB 4.2 189.00
Telephone conference with Dr. Roebuck of Dartmouth Medical School regarding review of data to testify to determine that landfill may present a substantial and imminent hazard. . . .

10/18/85 MJC 1.0 40.00
Conference with Don Bessette and Louis Bessette.

10/18/85 GLH 2.5 87.50
Interviews of property owners adjacent to the City landfill.

10/21/85 MJC 2.2 88.00
Conference with Attorney Pearson regarding adding Rose Bessette as party plaintiff to lawsuit; conference with Dagues regarding same.

10/22/85 RBL 2.5 150.00
Preparation for hearing on Motion for Preliminary Injunction. . . .

10/22/85 RNB 7.3 328.50
. . . preparation for preliminary injunction. . . .

10/23/85 WWP 5.5 467.50
. . . further research on preliminary injunction standards. . . .

10/23/85 RBL 4.0 240.00
Legal research in response to Motion to Continue hearing for preliminary injunction; . . . .

10/23/85 RNB 8.7 391.50
Draft affidavits in support of Motion for Preliminary Injunction; revise Memorandum in Opposition to Motion to Continue Hearing. . . .

10/23/85 MJC 4.2 168.00
Telephone conference with Ruth Einstein and Julie Hackbarth regarding testimony at preliminary injunction hearing; . . . organize file in preparation for preliminary injunction hearing; . . . .

10/24/85 WWP 3.0 255.00
Preparation and filing of affidavits; telephone conferences with experts; telephone conference with Ms. Smith; conference with clients; prepare for hearing.

10/24/85 RBL 3.0 180.00
Draft additional language to supplement Memorandum In Opposition to Motion to Continue; draft memorandum on preliminary injunction standards.

10/24/85 RNB 9.2 414.00
. . . preparation for hearing on preliminary injunction. . . .

10/24/85 MJC 8.6 344.00
Preparation for preliminary injunction hearing. . . .

10/25/85 WWP 4.0 340.00
Prepare for hearing on Motion for Preliminary Injunction.

10/25/85 RNB 7.6 342.00
Draft Affidavit of of [sic] Dr. Frank Reed; preparation for hearing on preliminary injunction; telephone conferences with Hackbarth and Einstein regarding testimony at preliminary injunction hearing . . .

10/25/85 MJC 4.5 180.00
Meeting with clients to sign Affidavits for preliminary injunction hearing; inspect Bessette property; test basement yard and bank holes for presence of methane gas.

10/26/85 WWP 2.0 170.00
Prepare for preliminary injunction hearing.

10/27/85 WWP 12.0 1,020.00
Preparation for tomorrow's preliminary injunction hearing.

10/27/85 RNB 11.2 504.00
Preparation for preliminary injunction hearing. . . .

10/27/85 MJC 10.5 420.00
Preparation for preliminary injunction hearing. . . .

10/28/85 WWP 10.0 850.00
Prepare for and represent clients at preliminary injunction hearing at federal court.

10/28/85 RNB 7.4 333.00
Preparation for and assist at hearing on preliminary injunction.

10/28/85 MJC 7.5 300.00
Prepare for and attendance at hearing; service of subpoenas; and conference with witnesses.

10/31/85 MJC 10.5 420.00
Conference with Attorney Pearson regarding work in preparation for 12/10/85 court hearing. . . .

11/01/85 MJC 0.8 32.00
Review photos for use at continued preliminary injunction hearing and/or trial.

12/02/85 MJC 6.2 248.00
Preparation for 12/9/85 hearing; . . . .

12/03/85 RNB 9.2 514.00
Preparation for hearing. . . .

12/03/85 MJC 6.8 272.00
Attend Goodkind deposition. . . .

12/04/85 RNB 9.4 423.00
Finish drafting proposed Findings of Fact; draft proposed Conclusions of Law; . . . .

12/05/85 WWP 7.5 637.50
. . . prepare Motion and Memorandum for Sanctions (?); prepare for Monday's hearing.

12/06/85 WWP 8.0 680.00
Review signed Interrogatories, Motion for Sanctions, prepare for Monday's hearing. . . .

12/06/85 RNB 8.3 373.50
Extensive preparation for hearing on preliminary injunction.

12/07/85 RNB 5.3 238.50
Revise proposed Findings of Fact; thorough review of deposition, transcripts and exhibits.

12/08/85 WWP 13.0 1,105.00
Preparation for preliminary injunction hearing.

12/08/85 RNB 11.2 504.00
Preparation for hearing on preliminary injunction. . . .

12/08/85 MJC 13.0 502.00
Preparation for preliminary injunction hearing. . . .

12/09/85 WWP 11.7 994.50
Prepare for and attend hearing; prepare for and take Countryman's deposition.

12/09/85 RNB 11.7 526.50
Preparation for hearing; attend and assist at same; preparation for deposition of William Countryman; attend at same.

12/09/85 MJC 10.6 424.00
Preparation for and attend preliminary injunction hearing; . . . .

12/10/85 GLH 1.2 42.00
Assist in transporting and delivering files to federal court for hearing.

12/10/85 RNB 8.4 378.00
Referencing preliminary injunction hearing.

12/10/85 MJC 9.3 372.00
Preparation for and attend preliminary injunction hearing. . . .

12/11/85 WWP 9.5 807.50
Preparation for and attend preliminary injunction hearing; . . . .

12/11/85 RNB 5.2 234.00
Review Goodkind deposition exhibits concerning migration of methane from the landfill for use at the hearing; attend same.

12/11/85 MJC 6.5 260.00
Preparation for preliminary injunction hearing; . . . .

12/12/85 WWP 9.0 765.00
Preparation for and attend hearing.

12/12/85 RNB 7.4 333.00
Draft preliminary statement and first argument of discussion re: preliminary injunction.

12/12/85 MJC 6.5 260.00
Attendance and note taking at preliminary injunction hearing.

12/13/85 WWP 9.0 765.00
Preparation for and attend hearing.

12/13/85 RNB 7.5 337.50
Draft memoranda concerning preliminary injunction hearing.

12/13/85 MJC 6.5 260.00
Attend and note taking at preliminary injunction hearing.

12/13/85 GLH 6.0 210.00
Assist in transporting files to Court. . . .

12/14/85 RNB 3.7 166.50
Drafting arguments concerning preliminary injunction.

12/15/85 WWP 11.0 935.00
Preparation for hearing.

12/15/85 RNB 13.2 594.00
Revision of memorandum on preliminary injunction motion.

12/16/85 WWP 9.0 765.00
Preparation for and attend hearing.

12/16/85 RNB 8.5 382.50
Finished drafting memoranda concerning hearing. . . .

12/16/85 MJC 8.0 320.00
Attending and note taking at preliminary injunction hearing.

12/17/85 WWP 5.6 476.00
Organize files from hearing; outline memorandum, additional proposed findings and concerns; telephone conferences with Court; telephone conference with Mr. Clapp.

12/19/85 WWP 8.0 680.00
Finish revising first section of memorandum, proposed findings and conclusions.

12/19/85 RNB 10.6 477.00
Revise supplemental memorandum in support of Plaintiffs' Motion for Preliminary Injunction.

12/19/85 MJC 7.1 284.00
Organize file, copy exhibits for filing with Court; index exhibits. . . .

12/20/85 WWP 3.8 323.00
Tour landfill, file supplemental memorandum in support of Plaintiffs' Motion for Preliminary Injunction

12/20/85 RNB 8.4 378.00
Draft third argument of discussion in supplemental memorandum. . . .

12/20/85 MJC 7.1 254.00
Landfill inspection with Attorney Pearson, opposing counsel, and Magistrate; preparation for filing Proposed Findings and Conclusions; arrange for copying; organized documents for filing.

01/02/86 WWP 4.8 408.00
Outline reply brief. . . .

01/02/86 RNB 8.3 373.50
Preparation of reply brief.

01/02/86 MJC 5.8 232.00
Analyze arguments opposing Defendant's Memorandum in Opposition to for [sic] Preliminary Injunction; organize file.

01/03/86 WWP 4.0 340.00
. . . analyze reply memorandum; research City's preliminary injunction authority.

01/03/86 RNB 8.8 396.00
Referencing reply memorandum.

01/05/86 RNB 4.3 193.50
Draft of reply memorandum.

01/06/86 WWP 6.0 510.00
Work on reply memorandum. . . .

01/06/86 MJC 4.8 192.00
Send out bills for copying, analyze Plaintiffs' response to Defendant's objections to proposed facts . . . review Defendant's objections to proposed facts; draft memorandum rebutting objections.

01/07/86 WWP 7.0 595.00
Reply memorandum.

01/07/86 RNB 2.3 103.50
Review Defendant's objections to Plaintiff's Proposed Findings of Fact; other work concerning reply memorandum.

01/07/86 MJC 3.2 128.00
. . . review draft Memorandum in Opposition to Defendant's Objection to Proposed Facts. . . .

01/09/86 WWP 3.0 255.00
Preparation for preliminary injunction hearing.

01/10/86 WWP 6.5 552.50
Preparation for and attend preliminary injunction hearing.

01/10/86 RNB 8.0 360.00
Draft memorandum relating to preliminary injunction hearing; attend hearing.

01/10/86 MJC 4.3 172.00
. . . attend final hearing on Motion for Preliminary Injunction.

01/20/86 MJC 0.6 24.00
Draft and review outline of facts proposed and not objected to by City.

01/27/86 WWP 1.8 153.00
Review proposed fact comparisons; review motion to compel.

01/31/86 MJC 1.8 72.00
Telephone conference with Ernie Dague, Jr. regarding trespass on his property by City.

02/21/86 WWP 1.0 85.00
Telephone conference with Attorney Bland about Magistrate's decision.

02/21/86 RNB 3.3 148.50
Review and analysis of the Magistrate's Report and Recommendation . . . (relating to the Report and Recommendation)

02/21/86 MJC 3.0 120.00
Telephone conference with Court regarding decision by Magistrate; review decision; telephone conferences with client regarding same.

02/22/86 WWP 0.5 42.50
Telephone conference with Attorney Bland concerning objections to Magistrate's decision.

02/23/86 RNB 2.3
Initial draft of Plaintiffs' objections to Magistrate's Report and Recommendation.

02/24/86 WWP 1.5 127.50
Review decision and analyze findings of fact.

02/24/86 RNB 0.6 27.00
Conference with Attorney Pearson concerning report and recommendation.

02/25/86 WWP 1.5 127.50
Analyze findings of fact and outline objections.

02/26/86 WWP 1.0 85.00
Further review of findings of fact.

02/27/86 WWP 1.5 127.50
Draft and edit outline for objections to Magistrate's decision.

02/27/86 RNB 8.3 373.50
Analyze of findings of fact.

02/28/86 WWP 1.0 85.00
Several telephone conferences with Mr. Bland about objections to Magistrate's decision.

02/28/86 RNB 7.5 337.50
Revise arguments in Plaintiff's objections. . . .

03/01/86 WWP 4.5 382.50
Organize and draft objections to Magistrate's ruling.

03/02/86 WWP 8.0 680.00
Edit draft and research objections to Magistrate's decision.

03/02/86 RNB 8.8 396.00
Referencing drafts of Plaintiff's objections.

03/03/86 WWP 3.5 297.50
Analyze objections, edit final draft.

03/03/86 RNB 11.9 535.50
Work re: objections to Magistrate's Report and Recommendations.

03/03/86 JHT 6.8
Conference with Attorney Bland regarding preparation of chronology based on findings of fact of Magistrate; review findings and development of chronological structure.

03/03/86 MJC 7.0 280.00
Assist in drafting and revising objections to Magistrates's recommendations. . . .

03/05/86 WWP 2.2 187.00
Revise proposed order.

03/05/86 RNB 5.8 261.00
Thorough review of City and Third-Party Defendant G.E.'s objections to Magistrates Report and

Recommendations; draft proposed order for preliminary injunction.

03/05/86 MJC 1.5 60.00
Revise memo regarding City's objections to Magistrate's recommendations.

03/24/86 MJC 0.3 12.00
Telephone conference with client regarding excessive trash in yard from landfill; plan further work to be done.

03/27/86 RNB 2.3 103.50
Thorough review and analysis of Judge Billings' opinion; telephone conference with Attorney Pearson to discuss Judge Billings' Opinion and grounds for an appeal therefore; legal research on procedures for the withdrawal of EPA authorization of a RCRA and the regulations promulgated thereunder; legal research on rules of appellate procedure for appealing an Order of the U.S. District Court.

03/27/86 MJC 0.6 24.00
Intraoffice conference regarding Court's denial of Motion for Preliminary injunction; review and analyze Court Order.

04/04/86 WWP 1.5 127.50
Review and analyze Judge Billings' decision and appeal options.

04/04/86 RNB 2.4 108.00
Further analysis of Judge Billings' Opinion and arguments to be made on appeal; draft outline of hazardous waste permit arguments to be made on appeal.

04/07/86 WWP 3.0 255.00
Outline and evaluate grounds for appeal; telephone conference with Court.

04/15/86 RNB 1.3 85.50
Further analysis of standards for preliminary injunction, standard of review on appeal, and arguments to be raised on appeal.

04/21/86 RNB 1.6 72.00
Analyze issues proposed to be raised on appeal and the procedure on appeal; draft notice of appeal.

04/22/86 WWP 2.0 170.00
Outline and analyze appeal issues; review exhibit and transcript requirements on appeal.

04/22/86 RNB 1.2 54.00
Further analysis of issues proposed to be raised on appeal; draft pre-argument statement.

04/22/86 MJC 0.4 16.00
Telephone conference with Federal Court for list of exhibits; review and proofread notice of appeal documents.

04/23/86 WWP 2.0 170.00
Lengthy review of procedures for Second Circuit Court of Appeals.

04/23/86 MJC 0.3 12.00
Review exhibit list from Federal Court; Memorandum to Attorney Bland regarding same.

04/24/86 RNB 0.8 36.00
Analyze procedure for docketing the appeal; telephone conference with Clerk of Federal District Court.

04/28/86 RNB 0.5 22.50
Review procedure for admission to practice before the U.S. Court of Appeals for the Second Circuit.

04/29/86 RNB 1.3 58.50
Further analysis of procedure on appeal; draft outline of procedure and deadlines on appeal.

04/30/86 WWP 1.0 85.00
Final review of forms C and D, other appeal procedures and proper certification.

04/30/86 RNB 1.5 67.50
Analyze need to file depositions of the generators so as to include them within the docket entries; review and analyze forms C and D and further legal research on procedures on appeal.

04/30/86 MJC 0.6 24.00
Submittal of depositions to Federal Court for filing; telephone conference with Court Clerk regarding same.

05/01/86 WWP 0.6 51.00
Final approval of appeal forms; service of same.

05/01/86 RNB 0.5 22.50
Review of papers to be filed in the Court of appeals and in the U.S. District Court, and to be served on the other parties.

05/04/86 MJC 0.3 12.00
Letter to Court Clerk regarding filing of depositions.

05/05/86 RNB 2.8 126.00
Legal research under RCRA and the CWA in preparation for drafting appellant's brief.

05-05-86 WWP 1.0 85.00
Read Second Circuit scheduling calendar; conference with Mr. Clapp; telephone conference with client.

05-06-86 RNB 5.2 234.00
Continue legal research under RCRA and the CWA in preparation for drafting brief.

05-07-86 WWP 1.0 85.00
Review appeal schedule of hearing dates and issues outline; review evidence of trash at Dague house; review photographs.

05-07-86 RNB 7.3 328.50
Draft letters to Mr. Burbank and Attorney Clap regarding consent to proceed before the Magistrate; telephone conference with Clerk of the U.S. District Court of Appeal for the Second Circuit regarding admission to practice before the Second Circuit; continue legal research of case law under RCRA and the CWA in preparation for drafting the brief.

05-08-86 WWP 0.5 42.50
Review exhibit requirements.

05-08-86 RNB 5.8 261.00
Draft first part of argument I of Appellants' brief.

05-09-86 WWP 2.3 195.50
Review outline for brief; letter to Mr. Clapp regarding exhibits.

05-09-86 RNB 6.3 283.50
Draft second and third parts of argument I of Appellants' brief.

05-09-86 MJC 2.0 80.00
Review exhibits to be filed with appeals court; deliver notice of exhibits designated to Attorney Clapp.

05-11-86 RNB 3.3 148.50
Draft argument II of appellants' brief.

05-12-86 RNB 5.5 247.50
Thorough analysis of Weinberger case and draft argument III of the brief.

05-13-86 WWP 4.5 352.50
Prepare for tomorrow's pre-argument conference

05-13-86 RNB 5.2 234.00
Draft statement of the case and statement of the facts; revise arguments I, II, and III; preparation for pre-argument conference.

05-14-86 WWP 9.00 765.00
Preparation for and attend conference at Second Circuit Court of Appeals.

05-14-86 RNB 11.0 495.00
Preparation for and attend pre-argument conference at the U.S. Court of Appeals for the Second Circuit.

05-15-86 WWP 0.3 25.50
Letter to the Court.

05-15-86 RNB 0.3 13.50
Telephone conference with Clerk of the U.S. Court of Appeals for the Second Circuit regarding scheduling of argument.

05-16-86 WWP 1.0 85.00
Review docket entries; telephone conference with Mr. Clapp; letter to Court.

05-16-86 MJC 0.7 28.00
Analyze exhibits to be designated on appeal; deliver notice of same to opposite counsel.

05-19-86 RNB 2.8 126.00
Compile appendix and table of contents of brief.

05-20-86 WWP 5.2 442.00
Draft and edit brief; detailed analysis of necessary revisions to same.

05-20-86 RNB 4.5 202.50
Telephone conference with Mr. Jarvis regarding depositions of third-party Defendants and

Plaintiffs' exhibits; analyze issues in need of additional legal research and analyze issues raised on appeal; analysis of City of Gallatin case and the "Hazardous and Solid Waste Amendments of 1984."

05-21-86 WWP 6.5 552.50
Draft and edit brief.

05-21-86 RNB 10.8 486.00
Further analysis of issues raised on appeal; review procedural requirements for brief; revise brief.

05-21-86 MJC 2.8 112.00
Send Judge billings' Opinion to Dr. Reed; assemble documents for Appendix to appellants' brief.

05-22-86 WWP 5.0 425.00
Further edits to brief; further analysis of waste industries and other important cases; review case chart.

05-22-86 RNB 8.3 373.50
Draft chart of case law for the appeal; draft checklist for the appeal; revise brief.

05-22-86 MJC 4.0 160.00
Assemble and paginate appendix to Appellants' brief; review citations in brief for appendix.

05-23-86 WWP 7.5 637.50
Extensive edit of brief; review filing form requirements.

05-23-86 RNB 7.3 328.50
Further analysis and revise brief; draft certificate of service.

05-23-86 JHT 2.2 99.00
Legal research regarding scope of discretion for injunctive relief.

05-23-86 MJC 5.0 200
Preparation for appeal; file organization; site inspection and conference with clients regarding city's request to clean bank beside landfill; assist in preparing documents for appeal.

05-25-86 WWP 4.5 382.50
Drafting and editing brief.

05-26-86 WWP 10.0 850.00
Extensive drafting and editing of brief; analyze judicial discretion and legal research on same.

05-26-86 MJC 7.7 308.00
Preparation for filing brief; appendix and addendum with Court of appeals; proofread brief; copy statutes for addendum.

05-26-86 DL 7.0 210.00
Legal research on standards for issuance of preliminary injunction upon violation of federal environmental and other public interest legislation.

05-27-86 WWP 2.5 212.50
Prepare brief for filing with Court of Appeals.

05-27-86 MJC 6.8 272.00
Prepare brief, appendix and addendum for filing; telephone conference with printers regarding same; organize and complete printing, proofread and revise brief; assemble packages of documents for filing and service; telephone conference with Don Bessette regarding City's request to clear bank; memorandum regarding same.

06-03-86 RNB 2.8 126.00
Preparation for oral argument; legal research on District Court's discretion to issue an injunction upon a finding of a statutory violation.

06-05-86 MJC 1.6 64.00
Draft letter to City regarding cleanup of embankment.

06-06-86 MJC 1.3 52.00
Review and edit letter to City regarding cleanup of embankment.

06-08-86 WWP 2.5 212.50
Analyze procedures; review notice documents; outline argument and organize appeal notebook.

06-11-86 WWP 4.0 340.00
Review and analyze City's brief; prepare notebook for argument.

06-11-86 RNB 8.0 360.00
Thorough review and analysis of City's brief; conference with Attorney Pearson to discuss notebook for oral argument and to discuss City's brief; compile documents for notebook for oral argument; review and analyze memorandum regarding traditional and second circuit standards for preliminary injunction.

06-11-86 MJC 2.4 96.00
Assist in preparing appeal notebook; telephone conference with appeals court regarding return of "extra" copies of appendix; review City's brief; organize file.

06-12-86 WWP 2.0 170.00
Edit letter to City; verify documents to court and hearing date; review first draft of reply brief.

06-13-86 WWP 2.4 204.00
Further analyze City's brief; telephone conferences with Mr. Sorrell; prepare for hearing; locate documents; review hearing binder; telephone conference with Mr. Wadhams.

06-13-86 RNB 4.2 189.00
Legal research on abandonment or waiver of a claim on appeal; compile documents for note book for oral argument.

06-15-86 WWP 3.5 297.50
Review legislative history for 1984 Amendments; review and analyze briefs.

06-16-86 WWP 1.5 127.50
. . . further analysis of City's brief.

06-16-89 RNB 1.5 67.50
Conference with Attorney Pearson regarding rescheduling of oral argument and discussion of "Hazardous and Solid Waste Amendments of 1954; further analysis of memorandum on statutory injunctions.

06-17-89 WWP 1.5 127.50
Telephone conference with Court; telephone conference with Mr. Clapp; Motion and Affidavit to Court regarding oral argument date.

06-17-89 RNB 1.8 81.00
Compile RCRA;s [sic] criteria for classification of sanitary landfills for notebook for oral argument.

06-18-86 RNB 0.7 31.50
Revise reply brief.

06-18-86 MJC 3.3 132.00
Conference with Don Bessette regarding signing of agreement with City to clean up bank; file maintenance; send briefs to clients; conference with Mr. Bessette regarding construction plan of his mother's property.

06-19-86 WWP 2.4 204.00
. . . prepare for oral argument; review argument notebook.

06-22-86 RNB 0.8 36.00
Discuss reply brief with Attorney Pearson . . . .

06-23-86 WWP 2.5 212.50
Draft reply brief.

06-23-86 RNB 3.5 157.50
Draft table of contents and table of cases and statutes for reply brief; thorough proofread of reply brief.

06-23-86 MJC 3.0 120.00
Draft certificate of service and enclosure letter to Court for filing reply brief; proofread reply brief; organize copying and distribution of reply brief; deliver to Attorney Clapp; send copies of all briefs to clients.

06-24-86 RNB 4.9 220.50
Draft statement of the case and outline of first argument for oral argument . . . .

05-26-86 RNB 5.2 234.00
Draft second and third arguments for oral argument.

07-01-86 RNB 1.5 97.50
Prepare for oral argument on appeal; review third-party Defendant's Memorandum in Opposition to City's Motion to Join Additional Defendants.

08-06-86 RNB 2.4 156.00
Further preparation for oral argument; draft list of questions likely to be raised at oral argument; telephone conference with environmental task force.

08-08-86 WWP 1.0 100.00
Prepare for oral argument.

08-10-86 WWP 3.6 360.00
Prepare for oral argument.

08-12-86	WWP	3.0	300.00
Prepare for oral argument.			
08-12-86	RNB	6.4	416.00
. . . preparation for oral argument.			
08-13-86	WWP	5.0	800.00
Prepare for tomorrow's argument; travel to New York city.			
08-13-86	RNB	8.5	552.50
Legal research on notice provisions of RCRA and the CWA; preparation for oral argument.			
08-14-86	WWP	8.0	800.00
Oral argument at Second Circuit.			
08-14-86	RNB	8.0	520.00
Further preparation for oral argument and attend oral argument.			
08-18-86	WWP	1.5	150.00
Review Second Circuit hearing and refile documents			
08-18-86	RNB	0.3	19.50
Telephone conference with Ernie Dague, Jr. regarding oral argument at Court of Appeals.			
08-20-86	WWP	1.0	100.00
Telephone conference with Court; review and analyze decision of Court of Appeals.			
08-21-86	WWP	5.0	500.00
Analyze all options for appeal			
08-21-86	RNB	1.5	97.50
Conference with Attorney Pearson to discuss decision and possible appeal from Second Circuit			
10-08-86	WWP	1.0	100.00
Analyze options in light of City's failure to respond to requests to admit.			

11-03-86	WWP	0.8	80.00
Review gas meter options			
11-03-86	MJC	2.4	96.00
. . . telephone conference with client regarding recalibration of gas meter			
11-10-86	MJC	1.0	40.00
. . . telephone conference with client regarding recalibration of gas meter; memorandum regarding same.			
11-17-86	WWP	0.6	60.00
. . . review gas meter calibration issue.			
11-24-86	MJC	0.8	32.00
Plan further work for Motion to Compel; file maintenance.			
05-12-87	MJC	0.4	16.00
Telephone conference with Don Bessette regarding proposed construction on mother's property; memorandum regarding same.			
05-18-87	MJC	0.8	32.00
Telephone conference with client regarding windblown trash problem; memorandum to attorney Pearson regarding same			
05-19-88	RNB	0.3	21.00
Assignments to legal assistant case regarding City's trespass on Ernie Dague, Sr.'s property			
05-19-88	MJC	0.5	22.50
Analysis of new fact issues regarding trespass by City			
08-26-88	RNB	1.3	91.00
Legal research on common law causes of action and defenses thereto in preparation for trial on pendant state claims.			

09-08-88 RNB 2.0 140.00
Legal research on compensation for paralegal hours and enhancement of attorney's fees . . . .

02-03-89 WWP 2.2 275.00
. . . organize and evaluate water test results against new state ground water regulations.

02-03-89 MJC 1.5 75.00
. . . review state groundwater regulations.

02-06-89 RNB 2.3 184.00
Review and analysis of Vermont's groundwater protection rule and strategy . . . .

02-06-89 MJC 1.0 50.00
Telephone conference with VANR regarding copy of current groundwater regulations and classification of state groundwater; report to Attorney Bland regarding same; . . . .

02-07-89 MJC 5.5 275.00
Attend Lamoille County Regional Solid Waste District meeting in Morrisville to monitor City and State representations regarding City's landfill.

02-08-89 MJC 0.6 30.00
Memorandum regarding Solid Waste District meeting and City and State statements regarding City's landfill.

05-08-89 MJC 11.0 550.00
Preparation for and assistance at trial of federal claims in Rutland; telephone conference with firm librarian regarding documents needed as exhibits.

05-09-89 MJC 11.5 575.00
Preparation for trial; assist at trial; mark admitted exhibits to be used at trial; telephone conference with firm librarian regarding maps of landfill and title search of landfill.

10-19-89 ART 9.1 682.50
Legal research regarding attorney fees under RCRA and Clean Water and Air Acts.

10-20-89 HB 3.1 372.00
Research regarding recovery of fees.

10-20-89 RNB 2.5 200.00
Compile and analyze legal research on recovery of costs of litigation under RCRA and CWA; compile receipts for disbursements incurred; conference with Attorney Briggs regarding legal research on loadstar and multiplier; telephone conference with Dr. Frank Reed regarding Judge Billings' decision.

10-20-89 ART 7.0 525.00
Continue legal research regarding awards of attorney fees under RCRA and Clean Water Act; shepardize cases.

10-20-89 AJG 1.8 81.00
Continue review of files for disbursement receipts.

10-22-89 ART 1.0 75.00
Legal research regarding attorney fees under RCRA and Clean Air Act; begin draft motion for fees.

10-23-89 HB 2.8 336.00
Continue preparation of fee application and accompanying affidavits.

10-23-89 ART 4.2 315.00
Continue draft motion for attorney fees and expenses.

10-24-89 RNB 1.8 144.00
Continue review and proofread draft statement of services.

10-25-89 GSC 2.4 216.00
Detailed line-by-line review of bill for legal services from 1985 to present; review standards for attorneys fees awards and enhancement criteria.

10-25-89 RNB 0.8 64.00
Conference with accounting department regarding statement of services.

10-25-89 ART 1.7 127.50
Revisions to Motion for Attorney Fees and supporting Memorandum.

10-26-89 RNB 4.3 344.00
Extended telephone conference with Attorney Pearson regarding draft statement of services; telephone conference with Attorney Gallagher regarding same; legal research on requirements governing court-awarded attorney fees applications; follow-up telephone conference with Attorney Gallagher regarding same; revise Plaintiffs' application for award of fees and costs and supporting memorandum.

10-26-89 ART 0.7 52.50
Legal research and analysis regarding contemporaneous time records requirement; telephone conference with accounting regarding bill.

10-27-89 RNB 3.3 264.00
Analyze requirements for court-awarded attorney fees applications; conference with accounting department regarding hourly rates for services; continue to revise memorandum in support of Plaintiffs' application for award of fees and costs.

10-28-89 RNB 4.3 344.00
Draft Affidavit in support of Plaintiffs' application for award of fees and costs; revise same; review receipts for expenses.

10-29-89 RNB 3.8 304.00
Revise Affidavit in support of Plaintiffs' application for award of fees and costs; extended telephone conference with Attorney Pearson regarding revisions to memorandum in support of Plaintiffs' application for award of fees and costs; continue to revise memorandum in support of Plaintiffs' application for award of fees and costs.

10-30-89 RNB 4.3 344.00
Telephone conference with Attorney Pearson regarding revisions to memorandum in support of Plaintiffs' application for award of fees and costs; follow-up telephone conference with Attorney Pearson regarding revisions to application and affidavit in support of Plaintiffs' application, for award of fees and costs; telephone conference with Attorney Mello regarding affidavit in support of Plaintiffs' application for award of fees and costs; telephone conference with Attorney Furlong regarding same; draft affidavits for Attorneys Mello and Furlong; telephone conference with Attorney Eggleston regarding affidavit in support of Plaintiffs' application for award of fees and costs; draft affidavit of Attorney Eggleston; thorough review and analysis of proposed attachment to Attorney Pearson's affidavit; edit Attorney Pearson's affidavit.

68,591.00

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS

Defendant's supplemental memorandum opposing Plaintiffs' fee request raises nothing new, but once again rehashes the same mootness argument twice rejected by this Court. *In Environmental Defense Fund v. Lee M. Thomas, Administrator, U.S. Environmental Protection Agency*, 24 E.R.C. 1853 (D.D.C. 1986), the District Court for the District of Columbia granted the plaintiffs' motion for award of attorneys' fees and expenses incurred in an action to compel the U.S. EPA to issue final permitting standards for underground waste disposal tanks, as required by section 3004(w) or RCRA, 42 U.S.C. § 6924(w). The defendants opposed the award for a number of reasons, including: (1) EPA *conceded from the start* that the RCRA statutory deadline had not been met; and (2) the date set by the court for EPA to promulgate the permitting standards was not the date sought by plaintiffs. The Court held that the plaintiffs did *not* have to show that they received all relief requested in their complaint in order to prevail. The court cited *Hensley v.*

Eckerhart, 461 U.S. 424 (1983), which set forth standards generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party:

> Plaintiffs may be considered prevailing parties for attorneys' fees purposes *if they succeed on any significant issue* in litigation which achieves some of the benefit the parties sought in bringing suit. 461 U.S. at 433 (emphasis added).

Even though this Court found the Defendant in significant violation of RCRA and the CWA, the Defendant continues to minimize and disparage its failure to comply with these federal environmental statutes. The Defendant continues to scoff at this Court's Orders dated March 26, 1986 and October 16, 1989, and federal law. This Court has already determined that Plaintiffs have "substantially prevailed" in this action therefore are entitled to their "costs of litigation, including reasonable attorney and expert witness fees." 42 U.S.C. § 6972(e) and 33 U.S.C. 1365(d). After four years of litigation, Plaintiffs' attorneys should receive promptly an award of their requested fees and costs.

Burlington, Vermont 31 December 1989

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland, Esq.
William W. Pearson, Esq.
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT COURT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

PETITION FOR ENFORCEMENT OF ORDER

By order dated 2 April 1990, this Court "ORDERED, ADJUDGED AND DECREED that plaintiff shall recover from the defendant the sum of $198,027.50 for attorneys fees, plus necessary expenses in the amount of $10,929.66, together with a 25% enhancement of the total attorneys fees in the amount of $49,506.87 plus taxable costs."[1] The defendant has failed and refused to make prompt payment of these fees and expenses, despite a request for payment from plaintiffs' counsel.

Wherefore, plaintiffs request the Court to order defendant to pay them forthwith its interim award of attorneys fees and expenses in the amount of $258,464.03, together with such other relief the Court deems just and proper.

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[1] These fees and expenses were incurred from 5 April 1985 through 30 October 1989.

Burlington, Vermont. 16 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
William W. Pearson
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

CERTIFICATE OF SERVICE

On 16 April 1990, I served Plaintiffs' Petition for Enforcement of Order on Defendant by mailing true and correct copies of same via first class mail, postage prepaid, to Robert R. McKearin, Esq., Dinse Erdmann & Clapp, 209 Battery Street, P. O. Box 988, Burlington, VT

05402-0988 and Nancy G. Sheahan, Esq., McNeil Murray, Inc., 271 South Union Street, Burlington, VT 05401.

Burlington, Vermont. 16 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PETITION FOR ENFORCEMENT OF ORDER

Defendant City of Burlington opposes Plaintiffs' Petition for Enforcement of this Court's Order of April 2, 1990. Plaintiffs as petitioners, have requested that this Court order the City of Burlington to pay "forthwith" the award of attorney's fees and expenses totaling $258,464.03. While characterized as an interim award in Plaintiffs' Petition, there is nothing in the Opinion and Order that would suggest that it is intended to be viewed as interim. Indeed, it appears to be the final order pertaining to the issue of attorney's fees. The claims left for resolution in this matter are to be tried to a jury and do not provide for an award of attorney's fees to a prevailing party.

Defendant's opposition to enforcement of the Order at this time is based primarily on the fact that the Order, for payment of more than a quarter of a million dollars to Plaintiffs' law firm, if enforced "forthwith" as Plaintiffs have requested, will impose a substantial burden on Defendant.

Furthermore, until judgment is entered, Defendant will not be able to challenge the award.

On the other hand, a delay of enforcement of the award pending entry of judgment (and pending resolution of the appeal) is appropriate inasmuch as there is no evidence that the Plaintiffs or their counsel will be prejudiced by such a delay of payment.

Accordingly, Defendant requests that the Plaintiffs' Petition for Enforcement of Order be denied.

Dated at Burlington, Vermont this 25th day of April, 1990.

DINSE, ERDMANN & CLAPP

By: /s/ Robert R. McKearin
Robert R. McKearin, Esq.
Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR., BETTY L. DAGUE, ADMINISTRATRIX OF THE ESTATE OF ERNEST J. DAGUE, II, BETTY DAGUE and ROSE A. BESSETTE	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S OPPOSITION TO ENFORCEMENT OF COURT ORDER

Defendant opposes enforcement of this Court's Order of April 2, 1990 claiming that, if enforced "forthwith," it will impose a "substantial burden" on Defendant.[1] Defendant makes this claim even though it has maintained for the past five years in its Annual Reports to the public that *any* award of attorneys fees will be covered by insurance proceeds. (See attached.) While Plaintiffs appreciate Defendant's reluctance to pay the Court's award of attorneys fees and costs, they question why Defendant should say one thing to this Court and the opposite to the public.

In addition, this action has been pending for almost five years, during which period Plaintiffs' counsel have received no payment of their fees and expenses. This has imposed a "substantial burden" on them. Certainly the

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[1] Defendant also claims that, even if the Court's Order is not enforced at this time, "the City's fiscal affairs will remain under the cloud of the Order awarding attorney's fees and costs."

Defendant does not want to pay the Court's award of fees and expenses *at any time*. Yet payment of the Court's award, however unpleasant, is the price to be paid for multiple violations of the federal environmental laws.

Burlington, Vermont. 30 April 1990.

DOWNS RACHLIN & MARTIN

By: /s/ Richard N. Bland
Richard N. Bland
William W. Pearson
Attorneys for Plaintiffs
199 Main St., P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

City of Burlington,
Vermont
1986 Annual Report
July 1, 1985 – June 30, 1986

* * *

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1986

19. Commitments and contingencies:

A. *Landfill litigation* – The City has been named as defendant in a lawsuit concerning the operation of the Burlington Landfill. As mentioned in last year's report, the claimants contend that the City's operation of its landfill violated the Federal Resource Conservation Act

and the Clean Water Act. They contend that the City improperly received hazardous waste, and that polluting leachate and methane gas has been permitted to migrate from the landfill in violation of the statutes to the individual damage of the named plaintiffs and the general public. They also assert pendant state common law claims. They are seeking money damages, attorneys fees and a permanent injunction requiring the City to dig up and remove offending materials to another complying landfill site.

The City is defending this case vigorously. Plaintiffs' initial request for a preliminary injunction was denied after extensive hearing by the U.S. District Court. Plaintiffs appealed, but the denial was affirmed by the 2nd Circuit Court of Appeals. Discovery proceedings are now taking place. The other insurance carriers are proceeding on the basis of a "reservation of rights" which allows them to later contend that their insurance policies do not cover the claimed loss. It is the City's assessment that a reasonable probability exists that the individual plaintiffs will be awarded some monetary damages. The City does not believe such damages will be significant. The City believes that both any monetary damages assessed and any award of attorneys' fees will be covered by insurance proceeds. However, insurance proceeds are not likely to be available in the event that the court should order the injunctive relief plaintiffs are seeking.

The cost to the City of relocating dumped materials could be quite significant indeed. A figure in the millions of dollars would not be an excessive estimate in the City's view. Under any such circumstances, it would be a major financial exposure for the City and would undoubtedly

result in the need for an emergency loan or other borrowing to cover the cash. However, the City is reasonably confident that such drastic measures will not be ordered by the court.

B. *Sewer litigation* – The City is a defendant in another lawsuit in which plaintiffs are seeking $1,000,000 in damages based on damages to real estate alleged to have occurred as a result of an overflow of a City sewer line. In addition, the plaintiffs are seeking $500 per day in damages for the City's refusal to issue a certificate of occupancy for said real estate. The City is cautiously optimistic that it will prevail. Though the City's liability carrier has reserved its right to later assert a lack of coverage, the City believes that any judgment

* * *

City of
Burlington, Vermont
1987 Annual Report
July 1, 1986 –
June 30, 1987

* * *

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1987

19. Commitments and contingencies:

A. *Landfill litigation* – The City has been named as defendant in a lawsuit concerning the operation of the Burlington Landfill. As mentioned in last year's report, the claimants contend that the City's operation of its landfill violated the Federal Resource Conservation Act and the Clean Water Act. They contend that the City

improperly received hazardous waste, and that polluting leachate and methane gas has been permitted to migrate from the landfill in violation of the statutes to the individual damage of the named plaintiffs and the general public. They also assert pendant state common law claims. They are seeking money damages, attorney fees and a permanent injunction requiring the City to dig up and remove offending materials to another complying landfill site.

The City is defending this case vigorously. Plaintiffs' initial request for a preliminary injunction was denied after extensive hearing by the U.S. District Court. Plaintiffs appealed, but the denial was affirmed by the 2nd Circuit Court of Appeals. Discovery proceedings are now taking place. The other insurance carriers are proceeding on the basis of a "reservation of rights" which allows them to later contend that their insurance policies do not cover the claimed loss. It is the City's assessment that a reasonable probability exists that the individual plaintiffs will be awarded some monetary damages. The City does not believe such damages will be significant. The City believes that both any monetary damages assessed and any award of attorneys' fees will be covered by insurance proceeds. However, insurance proceeds are not likely to be available in the event that the court should order the injunctive relief plaintiffs are seeking.

The cost to the City of relocating dumped materials could be quite significant. A figure in the millions of dollars would not be an excessive estimate in the City's view. Under any such circumstances, it would be a major financial exposure for the City and would undoubtedly

result in the need for an emergency loan or other borrowing to cover the cash requirements. However, the City is reasonably confident that such drastic measures will not be ordered by the court.

B. *Other litigation* – The City is involved in various other litigations which the City believes are either without sufficient merit or substance to be likely to result in material, uninsured judgments or settlements.

C. *Electric Department* –

1. The Electric Department purchases power from Vermont Yankee pursuant to the provisions of a contract which entitles

* * *

City of
Burlington
Vermont

1989
Annual Report
July 1, 1988 –
June 30, 1989

* * *

CITY OF BURLINGTON, VERMONT
NOTES TO COMBINED FINANCIAL STATEMENTS
JUNE 30, 1989

19. Commitments and contingencies:

A. *Landfill Litigation* – The most significant law suit from the standpoint of municipal liability was the case entitled *Dague, et al. v. City of Burlington*. During the past fiscal year, the United States District Court did find that the City had committed certain violations of the Federal

Clean Water Act and the Resource, Conservation & Recovery Act through the operation of the Burlington landfill. The court determined that there was some possibility that leachate from the facility would make its way into the tributaries of the Winooski River and then to the river and Lake Champlain. Because the Court found that the City had taken and was taking the proper steps to close such facility in an environmentally responsible manner, it refused to order the payment of any civil fines by the City. Since the City was planning to close the facility as of January 1, 1990 in any event, the order did not severely prejudice the City.

There remains pending before the Court a request from the law firm which represented the plaintiff for legal fees to be paid by the City. The claim is in the amount of $400,000. The City is most vigorously contesting both the entitlement to and the amount of the legal fees in question. The City is reasonably optimistic that either through Court order or as a result of the obligations of the insurance carrier that there will not be an obligation on the part of the City to pay the current amount in controversy from general city revenues.

B. *Landfill Contract* – On November 21, 1989, the City entered into an agreement to improve and operate a landfill in the town of Colchester, Vermont. This agreement is with Rathe, Inc., and includes a commitment by the City to construct an environmentally acceptable landfill. Work on this project was begun in November, 1989.

* * *

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ERNEST DAGUE, SR.,	:	
ERNEST DAGUE, JR., and	:	
BETTY DAGUE	:	Civil No.
	:	85-269
v.	:	
CITY OF BURLINGTON	:	

ORDER

On April 17, 1990, plaintiffs petitioned the court to enforce its previous order of April 2, 1990 which ordered the defendant to pay attorneys fees and necessary expenses. Defendant City of Burlington responded by moving for an entry of judgment of the April 2, 1990 order as well as the court's order of October 16, 1989.

In consideration of this matter, the court finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for a delay in entering judgment on these orders. Specifically, the court finds that with the exception of Count V addressed in the October 16, 1989 order, the claims decided by the two orders are independent from the state claims which remain; thus, there is no fair reason to delay certification for appellate review.

The court finds, however, that the October 16, 1989 order did not finally adjudicate damages as to Count V; therefore it is inappropriate to enter judgment as to that count. *See International Controls Corp. v. Vesco*, 535 F.2d 742, 748 (1976) ("[A] judgment cannot be considered final

as long as it leaves open the question of additional damages."); *Hudson v. Chicago Teachers Union Local No. 1*, 708 F. Supp. 961, 962 (N.D. Ill. 1989).

The defendant's motion for an entry of judgment is GRANTED IN PART. The plaintiff's petition for enforcement is DENIED pending appeal. The court directs the clerk of court to enter judgment as to Counts I, II, III and IV of the court's Opinion and Order, dated October 16, 1989, and the Opinion and Order dated April 2, 1990.

SO ORDERED.

Dated at Rutland in the District of Vermont this 4th day of May, 1990.

/s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON, Defendant-Appellant	)	

Counsel for Plaintiffs-Appellees respectfully submits, pursuant to Rule 39(c) of the Federal Rules of Appellate Procedure, the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the Defendant-Appellant and in favor of Plaintiffs-Appellees for insertion in the mandate.

Docketing Action

Cost of printing appendix (necessary copies ___)	N/A
Cost of printing brief (necessary copies 15)	$ 68.12
Cost of printing reply brief (necessary copies ___)	N/A
	$ 68.12

VERIFICATION

STATE OF VERMONT

COUNTY OF CHITTENDEN, SS.

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this

action and that the services for which fees have been charged were actually and necessarily performed. A copy of hereof was this day mailed to Michael Clapp, Esq. Dinse, Erdmann & Clapp, P.O. Box 988, Burlington, Vermont, 05402 with postage fully prepaid.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON, Defendant-Appellant.	)	

AFFIDAVIT

Heather Briggs, being duly sworn states as follows:

I am an attorney with Downs Rachlin & Martin, attorneys for the plaintiffs-appellees. The costs outlined in the Bill of Costs submitted herewith were necessarily incurred in connection with the appeal in this action. I make this affidavit to explain more fully the nature of the various items which appear on the Bill of Costs.

1. *Costs of Briefs and Appendices*. These costs were incurred for the copying and binding of appellees' brief, reply brief and appendices. Documents supporting this request are attached as Exhibit A. Plaintiff may recover these costs pursuant to Fed. R. App. P. 39(a). The sum of $68.12 represents the actual cost of reproduction and binding, which sum is less than $0.20 per page. Local Rule of the Second Circuit § 39; *Furman v. Cirrioto*, 782 F.2d 353 (2d Cir. 1986).

Burlington, Vermont. June 25, 1991.

DOWNS RACHLIN & MARTIN
Attorneys for Plaintiffs-Appellees

By: /s/ Heather Briggs
Heather Briggs

199 Main Street
P.O. Box 190
Burlington, VT 05402-0190
(802) 863-2375

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Subscribed and sworn to before me this 25th day of June, 1991.

/s/ Anita R. Tuttle
Notary Public

BILL OF COSTS

United States District Court	)	DISTRICT Vermont
Dague et al. Plaintiffs	)	DOCKET NO. 85-269
v.	)	
City of Burlington Defendant	)	MAGISTRATE CASE NO.

Judgment having been entered in the above entitled action on July 12, 1991 (date) against City of Burlington the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$ 130
Fees for service of summons and complaint	17.25
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	407.25
Fees and disbursements for printing	772.95
Fees for witnesses (itemized on reverse side)	279.24
Fees for exemplification and copies of papers necessarily obtained for use in case	845.80
Docket fees under 28 U.S.C. § 1923	

Costs incident to taking of depositions	4,385.54
Costs as shown on Mandate of Court of Appeals	
Other costs (Please itemize)	
TOTAL	$6,838.03

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories. Briefs should also be submitted supporting the necessity of the requested costs and citing cases supporting taxation of those costs.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed with postage fully prepaid thereon to: Michael Clapp, Esq., Dinse, Erdmann & Clapp, P.O. Box 988, Burlington, Vermont, 05402.

SIGNATURE OF ATTORNEY Heather Briggs

FOR: Ernest Dague, Sr. et al. DATE 6-25-91
Name of claiming party

) DATE AND TIME
Please take notice that I will)
appear before the clerk who will)
tax said costs on the following)
day and time:)

) AMOUNT TAXED
Costs are hereby taxed in)
the following amount and) $
included in the judgment:)

CLERK OF THE COURT (BY) DEPUTY CLERK DATE

WITNESS FEES (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME AND RESIDENCE	ATTENDANCE Days	ATTENDANCE Total Cost	SUBSISTENCE Days	SUBSISTENCE Total Cost	MILEAGE Miles	MILEAGE Total Cost	Total Cost Each Witness
Ruth Einstein, Montpelier, VT	1	30.00				15.00	45.00
Julie Hackbarth, Montpelier, VT	1	30.00				15.00	45.00
James Ogden, Burlington, VT	1	30.00				5.00	35.00

Thomas Moreau, Burlington, VT	1	30.00	5.00	35.00
Stephen Goodkind, Burlington, VT	1	30.00	3.00	33.00
William Rowley, Burlington, VT	1	30.00	13.12	43.12
Brian Heckenberger, Montpelier, VT	1	30.00	13.12	43.12

TOTAL $279.24

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54(d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6(e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"Entry of the judgment shall not be delayed for the taxing of costs."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON, Defendant	)	

MEMORANDUM IN SUPPORT OF BILL OF COSTS

Plaintiffs submit this memorandum in support of the expenses claimed in the foregoing bill of costs. Fed. R. Civ. P. 54; Fed. R. App. P. 39; 28 U.S.C. § 1920; 42 U.S.C. § 6972(e); 33 U.S.C. § 1365 (prevailing party may be awarded costs of litigation).

1. Filing Fees.

Plaintiffs incurred $125.00 in filing fees at the time they filed this complaint with the District Court. *Hohensee v. Basalyga*, 50 F.R.D. 230, aff'd 429 F.2d 982 (3rd Cir. 1969). Plaintiffs also incurred $5.00 as the fee for filing the notice of appeal in 1986. The fee is authorized pursuant to Fed. R. App. P. 39(e). This fee is to be taxed in the District Courts as costs of the appeal in favor of the Plaintiffs as the prevailing parties. *Id.*

2. Witness Fees

Plaintiffs incurred $279.24 in witness fees for attendance at the trial. Accordingly, all of these witnesses and the resulting fees were reasonably necessary to the case and are recoverable. *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530 (5th Cir. 1984).

3. Fees for Exemplification and Copies of Paper Necessarily Obtained for Use in the Case.

Title 28 U.S.C. § 1920(4) authorizes a judge or clerk of any court of the United States to include as costs photocopies necessarily obtained for use in the case. Plaintiff seeks recovery here only of those copies furnished to the court or opposing counsel. Such costs were approved in *Beech Cinema v. 20th Century Fox Film Corporation*, 480 F.2d 1195, 1198 (S.D. N.Y. 1979), affirmed 622 F.2d 1106 (2d Cir. 1980). In *Beech Cinema*, the prevailing party originally sought recovery of travel expenses, meals and lodging, messenger service, secretarial overtime, long distance phone calls, and postage costs. The court disallowed the above expenses as not authorized under a bill of costs. Additionally, however, the plaintiff sought recovery for photocopy expenses. The court allowed recovery of the costs of those copies "furnished to the court or opposing counsel." *Beech Cinema*, 48 F. Supp. at 1198. *See also Tavarez v. Heckler*, 610 F. Supp. 1059, 1064 (S.D. New York 1985).

In the instant action, Plaintiffs have submitted only the expenses they incurred in providing copies and exhibits to the Court and opposing counsel. Copying has been charged at the Court's rate of 20 cents per page.

Based upon the foregoing authority, Plaintiffs respectfully submit that their requested photocopying costs, totalling $845.80 are allowable and should be taxed.

4. Plaintiffs' Costs Incident to Taking Depositions.

Plaintiffs took the depositions of only the ten (10) individuals most directly involved in the events surrounding Defendant's management of the landfill, disposal at the landfill and the effects of the same. Specifically, these individuals were Steven Goodkind, Thomas Moreau, James Robear, Robert Dill, Laurence Bartlett, Frank Reed, Donald Stewart, William Countryman, Craig Heindel, Henry Hager, Swiatoslav Kaczmar and representatives of the Blodgett Co., Inc., the E.B. & A.C. Whiting Co., the Edlund Co., Inc. and General Electric. Most of these individuals testified at the trial. Plaintiffs respectfully submit that these depositions were crucial to Plaintiffs' case and costs incurred by Plaintiff to obtain copies of these depositions, totalling $4,385.54 should be awarded.

In *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855 (7th Cir. 1981), the expenses incurred in discovery depositions reasonably necessary to the case were held recoverable. In the instant case, Plaintiffs respectfully submit that the deposition testimony of each of the ten (10) deponents was essential to properly support the verdict in favor of Plaintiffs and, as in *Sangamo Construction Co.*, expenses incident to these depositions should be allowed.

WHEREFORE, Plaintiffs pray that costs totalling $6,838.03 be taxed against Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

Fed. I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Fed. I.D. No. 000601319

B3/40.0617

Not reproduced are 85 pages of original documentation (invoices, receipts, etc.) of expenses and disbursements totalling $6838.03, the amount of which is not disputed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	Civil Action No. 85-269
Plaintiffs	)	Appellate #90-7544
v.	)	
CITY OF BURLINGTON,	)	(Filed 6/25/91)
Defendant	)	

PLAINTIFFS' SUPPLEMENTAL APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs submit this application for their costs of litigation, including attorney fees and expenses, incurred in this action since October 31, 1989, excluding attorney fees and expenses relating to the appeal to the Second Circuit. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, provide that the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney and expert witness fees. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

On October 31, 1989, Plaintiffs submitted a fee application covering fees and expenses through that date, but *excluding* items properly includable on a bill of costs. On April 2, 1990, the district court ordered an interim award of $247,534.37, including a 25% risk enhancement. An interlocutory appeal was filed by Defendant, followed by an affirmance by the Second Circuit on June 12, 1991. Plaintiffs now seek to recover fees incurred in this Court

since October 31, 1989, the date of their last fee application in this Court. In support of this application, Plaintiffs submit affidavits and other documentation to substantiate the requested fees and expenses. .

WHEREFORE, Plaintiffs respectfully request that, based upon the attached affidavits of counsel, legal memorandum and other supporting documents, supplemental attorney fees in the amount of $24,113.00 be awarded to Plaintiffs and that this amount be enhanced 25% ($6,028.25) pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984) and this Court's order of April 2, 1990, for a total of $30,141.25. Plaintiffs further request that the Court award $2,707.61 for attorney expenses incurred in this matter since October 31, 1989 plus interest at the prevailing federal rate, 28 U.S.C. § 1961, from the date of judgment to the date of payment.

Burlington Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AZ 85702
(602) 622-3531

Federal I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Federal I.D. No. 000601319

B3/40.0617

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON, Defendant	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs submit this memorandum in support of their supplemental application for attorneys fees and expenses.

I. Statement of Facts

Plaintiffs Ernest Dague, Sr. Ernest Dague, Jr., Betty Dague and Rose A. Bessette brought this action against the City of Burlington, Vermont ("the City") for alleged violations of federal and state law arising out of the operation of the Burlington Municipal Disposal Grounds ("the Landfill"). Plaintiffs commenced this action under the citizen suit provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under pendent state claims. Plaintiffs sought injunctive relief, imposition of civil penalties, compensatory and punitive damages for their pendent state claims, costs, and attorneys fees.

After a bench trial, the Court issued its Findings of Fact, Opinion and Order, finding Defendant liable on four of the five statutory counts of Plaintiffs' Complaint. Thereafter, "[h]aving determined that plaintiffs have substantially prevailed in both their RCRA and CWA claims," the district court assessed fees and expenses in the amount of $247,534.37. The Defendant appealed and the Second Circuit affirmed the judgment of the District Court. Plaintiffs now move for a supplemental award for their attorney fees and expenses incurred in this court since October 31, 1989.

Since the date of Plaintiffs' last fee application, Defendant has moved for summary judgment, the District Court has awarded fees, and attempts were made to enforce that award, which ultimately resulted in the appeal to the Second Circuit by Defendant. Plaintiffs have been required by necessity to respond appropriately in

order to preserve the order of District Court. The result is that Plaintiffs' counsel have now prosecuted this action for almost six years without compensation. Plaintiffs submit that an interim order awarding payment of all fees and costs to date is appropriate.

II. Argument and Authority

The starting point for any calculation of attorneys fees is the "lodestar," the product of a reasonable hourly rate and the number of hours reasonably expended on substantive issues on which the petitioner satisfies the statutory threshold of success. *Sierra Club v. EPA*, 769 F.2d 796, 23 ERC 1001, 1002 (D.C. Cir. 1985); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). After the lodestar is calculated, a determination must be made as to whether any enhancement of the lodestar is appropriate. *Sierra Club*, 769 F.2d at 809-10.

A. Calculation of the Lodestar

This Court has already determined (and the Second Circuit has affirmed) that Plaintiffs have substantially prevailed on their federal claims, thereby entitling them to a fully compensatory fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). All that remains to be decided is whether the additional fees sought by Plaintiffs are based on "reasonable" rates and "reasonable" hours. "In computing the fee, counsel for [Plaintiffs as] prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136, 1147 (D.R.I.

1977) (analysis utilized in civil rights actions applicable to environmental cases) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976)).

Plaintiffs' attorneys have submitted two affidavits stating that their rates are those usually charged to clients who pay on an hourly basis, (Exhibits 1 and 2), as well as affidavits from other attorneys in Burlington, Vermont stating that the applicable rates for Downs Rachlin & Martin attorneys (and for Mr. Pearson, who is currently practicing in Tuscon, [sic] Arizona in the field of environmental law and whose current billing rate is $170 per hour), are reasonable. (Exhibits 3, 4 and 5). *Blum v. Stenson*, 465 U.S. 886 (1989). Plaintiffs' application is further supported by itemized contemporaneous records for all time expended. (Exhibits 1 and 2). The descriptive entries show that all time spent was reasonably necessary.

Accordingly, Plaintiffs submit that the appropriate lodestar is $24,113.00 in supplemental attorneys fees.

B. Enhancing the Lodestar

The next step to consider is whether an enhancement of the lodestar amount is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) ("*Delaware Valley II*"); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). An enhancement is appropriate here.

The purpose behind applying an enhancement or multiplier is to attract competent counsel. *SPIRG of New Jersey v. AT&T Bell Laboratories*, 842 F. 2d 1436, 27 ERC

1409, 1421 (3rd Cir. 1988); *Delaware Valley II*, 107 S.Ct. 3078 (1987). Simply stated, if plaintiffs' attorneys can receive as a *maximum* only the lodestar amount, after risking complete nonpayment as well as the hardships imposed by delay, lack of cash-flow, and out-of-pocket expenses, then competent counsel will be reluctant to serve on behalf of private attorneys general. The purpose underlying the "multiplier" is to balance the inherent inequities between plaintiffs and fee-paying defendants and to reward attorneys who take on public interest cases and achieve substantial results.

In this case, this Court has already determined that the enhancement of 25 percent (6,028.25) is appropriate, as affirmed by the Second Circuit. Accordingly, Plaintiffs request that the supplemental fees requested herein also be enhanced by the same amount, for a total fee award of $30,141.25.

C. Expenses

In addition to attorneys fees, Plaintiffs request that they be awarded reasonable expenses not otherwise recoverable in a bills of costs,[1] incurred in this action. Plaintiffs' counsel has attached an affidavit setting forth that these expenses were necessary and reasonably incurred and has attached copies of applicable bills and receipts, totalling $2,707.61. (Exhibits 1 and 2). Accordingly, Plaintiffs request that this amount also be awarded.

---

[1] Plaintiffs have submitted a separate Bill of Costs.

An award of costs in this case is not limited to those normally allowed pursuant to 28 U.S.C. § 1920 or F.R. Civ. P. 54. While there are few environmental cases on this point, case law developed under other fee-shifting statutes instructs that all reasonable out-of-pocket expenditures are to be awarded. *Shorter v. Valley Bank and Trust Co.*, 678 F.Supp. 714, 726 (N.D. Ill. 1988) (FLSA); *Reichman v. Bonsignore & Mazzotta*, 818 F.2d 278 (2d Cir. 1987) (citing *Laffey v. Northwest Airlines, Inc.*, 747 F.2d 4, 30 (D.C. Cir. 1984)); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988) (ADEA); *Kossman v. Calcumet County*, 849 F.2d 1027, 1030 (7th Cir. 1988) (ADEA); *Hidle v. Geneva County Board of Education*, 681 F. Supp. 752, 758 (D.C. Ala. 1988); *Laffey*, 746 F.2d at 30; *Thompson v. Sawyer*, 586 F. Supp. 635, 643 (D.D.C. 1984) (Title VII); *Planells v. Howard University*, ___ F.Supp. ___, 34 FEP 66, 71 (D.C.D.C. 1984) (Title VII); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 289 (N.D. Ill. 1983) (ADEA).

Courts addressing claims under environmental protection statutes have stated that the general policies underlying awards of fees and expenses in civil rights cases apply to similar fee requests under environmental statutes. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088, 24 E.R.C. 1577 (1986) (*"Delaware Valley I"*); *SPIRG of New Jersey v. AT&T*, 842 F.2d 1436, 1439 n.1 (3rd Cir. 1988); *Save Our Sound Fisheries Association v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977).

Courts resolving fee issues under the Clean Air Act, 42 U.S.C. § 7607(f), a fee shifting statute substantially similar to the fee shifting provision in RCRA and the CWA, (*SPIRG of New Jersey*, 842 F.2d at 1439 n.1) have

awarded costs similar to those requested by Plaintiffs here. *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985) (awarding telephone, photocopying, postage costs); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6-8 (D.C. Cir. 1982) (travel, postage, copies of legislative history and transcript expenses awarded). All expenses requested by Plaintiffs are therefore reimbursable.

D. Interest

Plaintiffs further request an award of post judgment interest pursuant to 28 U.S.C. § 1961.

III. CONCLUSION

Plaintiffs respectfully request the Court to award supplemental attorneys fees in the amount of $24,113.00, to enhance said fees 25% (for a total of $30,141.25) to award $2,707.61 for expenses, and post-judgment interest at the rate of 8.19% from October 17, 1989 to the date of payment by the Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

Federal I.D. No.

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Federal I.D. No. 000601319

Not reproduced are 13 pages of original documentation (invoices, receipts, etc.) of expenses and disbursements in each of exhibits 1 & 2 totalling $2,707.61, the amount of which is not disputed.

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs,	)	
v.	)	Civil Action
CITY OF BURLINGTON, Defendant.	)	No. 85-269

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR SUPPLEMENTAL AWARD OF FEES AND COSTS

STATE OF VERMONT)
CHITTENDEN COUNTY) SS.

Heather Briggs, being duly sworn, deposes and states as follows:

1.

I am an attorney in the law firm of Downs Rachlin & Martin, attorneys for Plaintiffs in this action. This affidavit provides the specification and itemization necessary for recovery of costs of litigation, including reasonable attorney fees and expenses, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2.

Attached hereto as Exhibit 1 are the billing statements by this law firm for legal services performed in this Court since October 31, 1989, exclusive of the appeal to the Second Circuit. These billings are accurate and true representations of work actually performed, compiled from time slips prepared by the attorney or legal assistant performing the work described. Time slips are prepared by each attorney and legal assistant on a daily basis and reflect actual time spent on the matter, as well as a description of the work performed. As shown in Exhibits 1 and 2, the total amount of Plaintiffs' attorneys fees

incurred from October 31, 1989 to May 7, 1990 is $24,113.00.

3.

Attached are copies of the expense receipts incurred in this Court since October 31, 1989, exclusive of amounts relating to the appeal and of any amount to be included in Plaintiffs' Bill of Costs. These receipts are accurate and true representations of expenses actually incurred and total $167.96. Certain other expenses were also necessarily incurred for which no receipts are available: (1) telephone $101.82; (2) postage $220.22; (3) travel $38.10; (4) computer legal research $617.11; and (5) copying $850.20[1]. These expenses total $1,827.45. Thus, total expenses per Exhibits 1 and 2, not otherwise recoverable in a Bill of Costs, are $2,707.61.

4.

William W. Pearson served as lead counsel for Plaintiffs in this matter. He was first admitted to the Indiana Bar and the U.S. District Court, Southern District of Indiana, in 1971; the Vermont Bar in 1975; the U.S. District Court, District of Vermont, in 1977; the U.S. Court of Appeals, Second Circuit, in 1986; the Arizona Bar and the U.S. District Court, District of Arizona, in 1989. He received his undergraduate degree from University of

[1] The practice of Downs Rachlin & Martin is to pass necessarily incurred litigation expenses on to fee-paying clients and not to increase hourly rates to absorb such expenses.

Chicago in 1968. He then attended Georgetown University Law Center where he received his J.D. in 1971. He is presently a member of the Arizona, Vermont and American Bar Associations.

Mr. Pearson is an experienced trial attorney in the field of environmental law. His experience with environmental legal problems includes hazardous waste management, toxic torts, NPDES permits, landfills, hazardous waste risk management and commercial lending, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

5.

Richard Bland assisted Mr. Pearson in this matter. Mr. Bland was first admitted to the Vermont Bar in 1985; the U.S. District Court, District of Vermont, in 1986; and the Supreme Court of the United States in 1989. Mr. Bland received his undergraduate degree form [sic] University of Vermont in 1982. He then attended Washington University School of Law where he received his J.D. in 1985. Mr. Bland is presently a member of the Chittenden County, Vermont and American Bar Associations.

Mr. Bland was, during his employment with this firm, a trial attorney whose practice was primarily in the field of environmental law. He has experience in resolving environmental legal problems involving hazardous waste management, including the generation, transportation, storage and disposal of hazardous waste, landfills, RCRA, CWA, Superfund, asbestos, underground storage tanks, hazardous waste risk management and commercial

lending, and insurance coverage for environmental claims.

6.

Based upon personal knowledge of hourly rates charged by other attorneys in the Burlington area with similar experience, reputation and skill, I know that rates from $100 – $175 per hour are routinely charged. As shown in Exhibit 1, there are varying levels of rates charged by the law form of Downs Rachlin & Martin. Work performed by partners is billed at $100 – $175 per hour. Work performed by associates is billed at $65 – $110 per hour, depending on the level of experience. The following is a list of each attorney and legal assistant who worked on this case, the amount of time they spent on this case, and their hourly rates:

Heather Briggs	0.50	HOURS	AT	130.00/HR = 65.00
Heather Briggs	4.50	HOURS	AT	120.00/HR = 540.00
Richard N. Bland	30.10	HOURS	AT	90.00/HR = 2,709.00
Richard N. Bland	84.80	HOURS	AT	80.00/HR = 6,784.00
Anita R. Tuttle	8.20	HOURS	AT	75.00/HR = 615.00
Michael J. Case	2.00	HOURS	AT	55.00/HR = 110.00
Michael J. Case	2.30	HOURS	AT	50.00/HR = 115.00

7.

In order to substantiate that the requested hourly rates are reasonable, attached are Exhibits 3, 4 and 5 which are affidavits from attorneys in the Burlington area which set forth their respective billing rates and further indicate the hourly rates for counsel with similar experience, reputation and skill.

8.

The environmental practice at Downs Rachlin & Martin has been limited to representing fee-paying clients, because of the risk associated with the representation of private attorneys general and plaintiffs on a contingency fee basis. Thus, most of the hours spent on this matter would have been spent representing other clients who would pay our hourly rates on a monthly basis.

Nevertheless, all work associated with Defendant's statutory liability was taken on a contingent basis: had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims. In fact, to date, this firm has not received any payment for its services.

An important factor in this firm's decision to purse Plaintiffs' statutory claims was the opportunity to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount. This incentive, in my professional opinion, is necessary to attract competent counsel to represent private attorneys general in public interest litigation. Accordingly, I am of the opinion that Plaintiffs would have faced extreme difficulties in finding

other local counsel of similar experience to pursue their claims under RCRA and the CWA on an hourly rate to be paid only on the contingency of success.

June 25, 1991 /s/ Heather Briggs
Date Heather Briggs

Sworn to and subscribed before me this 25th day of June, 1991.

/s/ Anita R. Tuttle
Notary Public
Commission Expires: 2/10/95

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

June 24, 1991

MRS. ERNEST DAGUE
272 MANHATTAN DRIVE
BURLINGTON, VT 05401

FILE NUMBER: 23690001

DRAFT NUMBER: 1.002

FOR THE PERIOD THROUGH May 6, 1990

DAGUE V. CITY OF BURLINGTON

Sample Entry –

Date:	Atty:	Hours:	Amount:
Description of Services:			
10/31/89	RNB	12.30	984.00
LETTER TO ATTORNEY PEARSON REGARDING HIS AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; DRAFT LETTER TO ATTORNEYS CLAPP AND MCNEIL REGARDING PLAINTIFFS' SETTLEMENT DEMAND; LETTER TO MR. BURBANK REGARDING FILING AND SERVICE OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS, SUPPORTING MEMO, AFFIDAVITS AND EXHIBITS; TELEPHONE CONFERENCE WITH ACCOUNTING DEPT. REGARDING REVISIONS TO STATEMENT OF SERVICES; REVIEW ATTORNEY EXPENSES AND COMPILE RECEIPTS THEREFORE; PROOFREAD PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS, SUPPORTING MEMORANDUM AND AFFIDAVITS AND EXHIBITS; TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME; SERVICE AND FILING OF SAME.			
10/31/89	ART	6.30	472.50
LEGAL RESEARCH REGARDING EXPENSES TO BE APPLIED FOR IN BILL OF COSTS; REVIEW EXPENSES.			
10/31/89	MJC	0.50	25.00
REVIEW DISBURSEMENT RECORDS AND TIMESHEETS FOR RECOVERY OF LEGAL FEES.			

11/01/89 ART 0.80 60.00
ORGANIZATION OF BILL OF COSTS SUPPORTING DOCUMENTS AND OUTLINE.

11/03/89 MJC 0.40 20.00
REVIEW MOTION FOR ATTORNEYS FEES AND ASSOCIATED DOCUMENTS.

11/08/89 RNB .30 24.00
LEGAL RESEARCH ON DISPLACEMENT OF CITIZEN SUITS UNDER RCRA BY FEDERALLY AUTHORIZED STATE PROGRAMS.

11/11/89 RNB 2.30 184.00
FURTHER LEGAL RESEARCH ON EXCEPTIONS TO 60-90 DAY NOTICE AS A CONDITION PRECEDENT TO COMMENCING A CITIZEN SUIT UNDER THE CWA AND RCRA; LEGAL RESEARCH ON TOXIC POLLUTANT EFFLUENT STANDARDS AND PROHIBITIONS UNDER SECTION 1317(A) OF THE CWA.

11/14/89 RNB 12.50 1,000.00
REVIEW DEFENDANT'S NOTICE OF APPEAL AND ANALYZE ITS MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; REVIEW AND ANALYZE FEDERAL RULES OF APPELLATE PROCEDURE, 28 U.S.C. §§ 1291, 1292, AND APPEALS TO THE SECOND CIRCUIT (6TH EDITION); EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND CROSS-APPEALABLE ISSUES; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING VOLUNTARY DISMISSAL OF APPEAL OF INTERLOCUTORY DECISION OF JUDGE BILLINGS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SAME AND SETTLEMENT POSSIBILITIES;

FOLLOW-UP ATTORNEY PEARSON REGARDING SAME; ATTEND EMERGENCY MEETING OF CITY BOARD OF ALDERMEN REGARDING LANDFILL CRISIS.

11/14/89 ART 0.50 37.50
REVIEW OPPOSITION MEMO TO PLAINTIFF'S REQUEST FOR FEES; ANALYZE APPEAL AND FINALITY ISSUES.

11/15/89 RNB 3.30 264.00
FURTHER REVIEW AND ANALYSIS OF CITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSS [sic]; REVIEW AND ANALYZE STIPULATION OF DISMISSAL OF APPEAL; LEGAL RESEARCH ON ENHANCEMENT OF ATTORNEYS' FEES UNDER FEE-SHIFTING STATUTES.

11/15/89 ART 0.60 45.00
ANALYSIS OF RESPONSE TO MEMO IN OPPOSITION.

11/20/89 HB 2.50 300.00
RESEARCH AND PREPARATION OF REPLY BRIEF REGARDING FEE APPLICATION.

11/20/89 RNB 6.80 544.00
THOROUGH REVIEW AND ANALYSIS OF HAUSTROM V. TILLAMOOK COUNTY DECISION; ANALYZE ARGUMENTS AND CASELAW IN REPLY TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; BEGIN DRAFTING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF FEES AND COSTS, INCLUDING FIRST ARGUMENT THAT PLAINTIFFS HAVE SUBSTANTIALLY

PREVAILED, ENTITLING THEM TO A FULLY COMPENSATORY FEE AWARD.

11/21/89 HB 2.00 240.00
REVISIONS TO REPLY BRIEF CONCERNING FEE APPLICATION.

11/21/89 RNB 6.30 504.00
FURTHER LEGAL RESEARCH ON STATUTORY FEE AWARDS; CONTINUE DRAFTING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR FEES AND COSTS, INCLUDING ARGUMENTS THAT DEFENDANT'S GENERALIZED OPPOSITION IS INSUFFICIENT TO REDUCE THE LODESTAR AND THE LODESTAR REQUESTED SHOULD BE ENHANCED; REVISE SAME.

11/22/89 RNB 1.50 120.00
LETTER TO ATTORNEY MCKEARIN; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR AWARD OF FEES AND COSTS; PROOFREAD, SERVICE AND FILING OF SAME; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS.

11/29/89 RNB 0.50 40.00
REVIEW AND ANALYZE MINUTES OF 14 NOVEMBER 1989 EMERGENCY MEETING OF CITY'S BOARD OF ALDERMEN.

12/04/89 RNB 2.70 216.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY WILLIAM PEARSON REGARDING HEARING ON PLAINTIFFS'

APPLICATION FOR AWARD OF FEES AND COSTS AND ARGUMENT IN RESPONSE TO CITY'S OPPOSITION THERETO; ATTEND HEARING ON CITY'S MOTION TO DISMISS IN STATE OF VERMONT V. CITY OF BURLINGTON PENDING IN CHITTENDEN SUPERIOR COURT.

12/07/89 RNB 0.30 24.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON IN FURTHER PREPARATION FOR HEARING ON PLAINTIFFS' APPLICATION FOR AN AWARD OF FEES AND COSTS.

12/07/89 MJC 1.00 50.00
TELEPHONE CONFERENCE WITH DON BESSETTE AND ROSE BESSETTE REGARDING STATUS OF CASE.

12/08/89 RNB 1.30 104.00
FURTHER PREPARATION FOR HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND ARGUMENT FOR ENHANCEMENT OF FEES.

12/10/89 RNB 4.80 384.00
REVIEW AND ANALYZE CASELAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS AND PREPARE ORAL ARGUMENT FOR HEARING ON SAME.

12/11/89 RNB 10.30 824.00
FURTHER LEGAL RESEARCH ON FEDERAL COURT AWARDS OF ATTORNEY'S FEES; FURTHER PREPARATION FOR AND ATTEND HEARING ON PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS; THOROUGH REVIEW AND ANALYSIS OF CITY'S

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES; REVIEW CITY'S INTERROGATORIES AND REQUESTS TO PRODUCE DATED 11 DECEMBER 1989; THOROUGH REVIEW AND ANALYSIS OF DEFENDANT'S MOTION FOR JUDGMENT AND®OR SUMMARY JUDGMENT AND®OR DISMISSAL OF COUNTS I – V OF PLAINTIFFS' COMPLAINT; FURTHER REVIEW AND ANALYSIS OF HAUSTROM V. TILLAMOOK COUNTY.

12/12/89 RNB 3.70 296.00
DRAFT PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; REVIEW AND ANALYZE 9TH CIRCUIT COURT OF APPEALS DECISION IN HAUSTROM V. TILLAMOOK COUNTY.

12/13/89 MJC 0.40 20.00
TELEPHONE CONFERENCE WITH DON BESSETTE AND LETTER TO BESSETTE.

12/14/89 RNB 1.50 120.00
FURTHER ANALYSIS OF DEFENDANT'S MOTION FOR DISMISSAL AND U.S. SUPREME COURT DECISION IN HAUSTROM V. TILLAMOOK.

12/15/89 RNB 4.30 344.00
BEGIN DRAFTING MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I, II, III AND IV OF PLAINTIFFS' COMPLAINT; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

12/17/89 RNB 4.30 344.00
CONTINUE DRAFTING MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION

FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I – IV OF PLAINTIFF'S COMPLAINT.

12/19/89 RNB 3.30 264.00
LETTER TO ATTORNEY PEARSON REGARDING DRAFT MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND/OR DISMISSAL OF COUNTS I – IV OF PLAINTIFFS' COMPLAINT AND DRAFT OF PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; ATTEND HEARING AT CHITTENDEN SUPERIOR COURT ON STATE'S MOTION FOR PRELIMINARY INJUNCTION IN STATE OF VT. V. CITY OF BURLINGTON; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND DRAFT RESPONSE MEMORANDA.

12/23/89 JCG 0.30 37.50
LEGAL RESEARCH APPLICATION OF "LAW OF THE CASE" DOCTRINE; INTRAOFFICE MEMORANDUM TO ATTORNEY BLAND.

12/27/89 RNB 1.30 104.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS AND PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT AND®OR DISMISSAL OF COUNTS I – IV OF PLAINTIFFS' COMPLAINT, AND SERVICE AND FILING OF SAME; REVISE AND PROOFREAD SAME.

12/28/89 RNB 1.20 96.00
LETTER TO CLERK OF COURT REGARDING FILING OF MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT

AND/OR DISMISSAL OF COUNTS I-IV OF PLAINTIFFS' COMPLAINT AND PLAINTIFFS' REPLY IN SUPPORT OF AN AWARD OF FEES AND COSTS; LEGAL RESEARCH ON LAW-OF-CASE DOCTRINE; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ARGUMENTS AGAINST DISMISSAL OF COUNTS II AND IV OF PLAINTIFFS' COMPLAINT.

01/10/90 RNB 1.30 117.00
REVIEW AND ANALYZE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION DATED DECEMBER 11, 1989; LETTER TO ATTORNEY PEARSON REGARDING SAME.

03/01/90 RNB 0.50 45.00
TELEPHONE CONFERENCE WITH MRS. BETTY DAGUE REGARDING PENDING MOTION FOR DISMISSAL AND APPLICATION FEES, AND JURY TRIAL ON PENDENT STATE CLAIMS; REVIEW CITY'S 1989 ANNUAL REPORT REGARDING LANDFILL LITIGATION; LETTER TO ATTORNEY PEARSON REGARDING SAME.

03/16/90 RNB 2.50 225.00
THOROUGH REVIEW AND ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER ON CITY'S MOTION FOR DISMISSAL; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; BRIEF TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SAME.

03/19/90 RNB 0.50 45.00
FURTHER ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER ON CITY'S MOTION

FOR DISMISSAL AND ANALYZE SETTLEMENT STRATEGY.

04/03/90 RNB 1.00 90.00
EXTENSIVE ANALYSIS OF JUDGE BILLINGS' OPINION AND ORDER REGARDING ATTORNEYS FEES AND EXPENSES; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

04/04/90 HB 0.50 65.00
CONFERENCE WITH RICHARD BLAND AND RESEARCH REGARDING ENFORCEMENT OF INTERIM FEE AWARD.

04/06/90 RNB 0.60 54.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING JUDGE BILLINGS' OPINION AND ORDER DATED 2 APRIL 1990; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S INTENT TO ABIDE BY THE ORDER AND MAKE PAYMENT OF THE FEE AWARD.

04/07/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S TENTATIVE DECISION NOT TO PAY THE FEE AWARD OF JUDGE BILLINGS' 2 APRIL 1990 OPINION AND ORDER.

04/10/90 RNB 0.30 27.00
LETTER TO ATTORNEY MCKEARIN REGARDING CITY'S INTENT TO PAY AWARD OF FEES AND COSTS.

04/11/90 RNB 2.50 225.00
REVIEW ATTORNEY MCKEARIN'S 10 APRIL 1990 LETTER REGARDING CITY'S INTENT TO MAKE PAYMENT OF COURT-AWARDED FEES AND EXPENSES; TELEPHONE CONFERENCE

WITH ATTORNEY PEARSON REGARDING SAME; LEGAL RESEARCH ON APPEALS FROM INTERLOCUTORY DECISIONS UNDER 28 USC § 1292(B) AND F.R.A.P. 5.

04/13/90 RNB 0.70 63.00
DRAFT PETITION FOR ENFORCEMENT OF ORDER OF ATTORNEYS FEES AND EXPENSES; LETTER TO ATTORNEY PEARSON REGARDING SAME.

04/16/90 RNB 0.80 72.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DRAFT PETITION FOR ENFORCEMENT OF ORDER; REVISE SAME; SERVICE AND FILING OF SAME.

04/17/90 RNB 0.60 54.00
TELEPHONE CONFERENCE WITH MRS. BETTY DAGUE REGARDING STATUS OF COURT'S AWARD OF FEES AND EXPENSES AND HER AVAILABILITY FOR JURY TRIAL ON PENDANT STATE CLAIMS; CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING FEES AND EXPENSES INCURRED FROM 31 OCTOBER 1989 TO DATE.

04/19/90 RNB 1.30 117.00
REVIEW AND ANALYZE ATTORNEY MCKEARIN'S 17 APRIL 1990 LETTER REGARDING DR. KACZMAR'S BILL; ANALYZE CITY'S DISCOVERY RESPONSES REGARDING INSURANCE COVERAGE; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING PARTY RESPONSIBLE FOR PAYMENT OF DR. KACZMAR'S BILL.

04/19/90 MJC 2.00 110.00
LOCATE FILE DOCUMENTS REGARDING SETTLEMENT OFFERS, INSURANCE COVERAGE FOR CITY OF BURLINGTON; CONFERENCE WITH ATTORNEY BLAND REGARDING SAME.

04/20/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S REQUEST FOR PAYMENT OF DR. KACZMAR'S BILL AND PNF HEARING ON PETITION FOR ENFORCEMENT OF ORDER.

04/26/90 RNB 11.30 1,017.00
THOROUGH REVIEW AND ANALYSIS OF CITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PETITION FOR ENFORCEMENT OF ORDER, MOTION FOR ENTRY OF JUDGMENT AND SUPPORTING MEMORANDUM OF LAW; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; EXTENSIVE LEGAL RESEARCH REGARDING ENTRY OF PARTIAL JUDGMENT UNDER F.R.C.P. 54(b).

04/27/90 RNB 2.30 207.00
DRAFT MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT; REVISE SAME.

04/30/90 RNB 3.30 297.00
LEGAL RESEARCH ON STAY UPON APPEAL AND STAY OF JUDGMENT AS TO MULTIPLE CLAIMS; DRAFT PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO ENFORCEMENT OF COURT ORDER; REVISE SAME; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

Heather Briggs	0.50	HOURS	AT	130.00/HR = 65.00
Heather Briggs	4.50	HOURS	AT	120.00/HR = 540.00
Richard N. Bland	30.10	HOURS	AT	90.00/HR = 2,709.00
Richard N. Bland	84.80	HOURS	AT	80.00/HR = 6,784.00
Anita R. Tuttle	8.20	HOURS	AT	75.00/HR = 615.00
Michael J. Case	2.00	HOURS	AT	55.00/HR = 110.00
Michael J. Case	2.30	HOURS	AT	50.00/HR = 115.00
TOTAL SERVICES RENDERED				$ 10,938.00

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs	)	Civil Action No. 85-269
v.	)	
CITY OF BURLINGTON, Defendant	)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL APPLICATION FOR AWARD OF FEES AND COSTS

STATE OF ARIZONA)
) AFFIDAVIT
COUNTY OF PIMA -)

William W. Pearson, being duly sworn, deposes and states as follows:

1. From the beginning of this action until May 30, 1989, I was a partner in the law firm of Downs, Rachlin & Martin, attorneys for plaintiffs in this action. Since June 1, 1989, I have been with the firm of Molloy, Jones & Donohue [sic] in Tucson, Arizona. This affidavit provides additional support for plaintiffs' application for the award of fees and costs on appeal pursuant to this Court's Order of June 12, 1991, and 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2. My relevant background is as follows:

a. B.A. degree from University of Chicago in 1968

b. J.D. degree from Georgetown University Law Center in 1971

c. Admitted to Indiana Bar and U.S. District Court, Southern District of Indiana in 1971

d. Admitted to Vermont Bar in 1975 and the U.S. District Court, District of Vermont in 1977

e. Admitted to U.S. Court of Appeals, 2nd Circuit in 1986

f. Admitted to Arizona Bar and U.S. District Court, District of Arizona in 1989.

3. I am an experienced trial attorney in the field of environmental law. I have handled a variety of environmental legal problems including hazardous and solid waste management, toxic torts, NPDES permits, landfills, lender liability for environmental hazards, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

4. In practicing environmental law in Vermont, it is my experience that a very high percentage of fee paying clients retain big city, national law firms to do their high stakes, sophisticated environmental work. For example, Downs, Rachlin & Martin is one of only a couple Vermont law firms who are lead counsel for a significant party in Vermont's Superfund sites. The other significant parties are represented by law firms from such places as Boston, New York City, and Washington, D.C. These outside Vermont firms are hired because the laws are complex, the technical issues sophisticated and the financial stakes are high. Commensurate with their experience and expertise, these out-of-state firms charge hourly fees substantially higher than their Vermont counterparts.

5. Presently, I am responsible for the environmental practice in Molloy, Jones & Donahue, which is one of the premier law firms in Tucson, Arizona, a city whose population is greater than all of Vermont. I am continuing my environmental law practice in the areas outlined above. My present hourly rate is $170.00 per hour.

6. Attached to this Affidavit is an account of legal services provided by me in this action from October 31,

1989 to May 6, 1990. During this time, I kept contemporaneous records of the date and time spent working on this case. I also made contemporaneous description entries for the work done.

7. I have reviewed the attachments to Exhibits 1 and 2. To the best of my knowledge, Exhibits 1 and 2 are fair and accurate itemizations of the legal services and costs related to this action for the time period stated herein, including necessary costs to Vermont to argue Plaintiff's first application for fees.

8. Concerning the plaintiffs' application for an enhancement of the fees as stated, it is my considered judgment that the plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself based on the following:

a. The plaintiffs had no funds with which to pay for legal services on an up-front basis;

b. At the time this suit was brought Attorney Bland and I were among a handful of Vermont lawyers sufficiently sophisticated in this specialized area to handle plaintiffs' claims;

c. Defendant is a political subdivision which does not function or have priorities like a private sector party thereby increasing the uncertainty of a strategy and outcome;

d. The enormous up-front expense in this case of services and costs incurred would be prohibitive to all but larger law firms.

9. In summary, in my professional judgment, the total lodestar and enhancement requested are reasonable

and appropriate given all the factors listed in the Application itself and in this affidavit.

/s/ William W. Pearson
William W. Pearson

SUBSCRIBED AND SWORN TO before me this 21 day of June, 1991, by William W. Pearson.

/s/ Jeff Thompson
Notary Public

My Commission Expires:
My Commission Expires November 11, 1994

B3:40:0617

BILLING STATEMENT OF
WILLIAM W. PEARSON, ESQ.
TUCSON, ARIZONA

June 25, 1991

Mr. Ernie Dague, Sr.
Estate of Ernie Dague, Jr.
Mrs. Betty Dague
Ms. Rose Bessette
Manhatten Drive
Burlington, Vermont 05401

File Number: 2369-0001

For Period: October 31, 1989 to May 7, 1990

Matter: Dague v. City of Burlington

Sample Entry –

Date:	Hours:	Amount:
Description of Services:		
10/31/89	6.3	1071.00
Analyze WWP affidavit in support of plaintiff's application for award of fees and costs; review draft motion and memorandum plus attachments; analyze and edit demand letter to city		
11/7/89	1.0	170.00
Outline issues which city likely to appeal with focus on notice requirements under RCRA (no notice, 60 day notice and 90 day notice), CWA 60 day notice and adequacy of notice under regulation requirements;		
11/9/89	1.8	306.00
Analyze strategy options for city: will stay be automatic, will attorney fees issue be split off, will city file declaratory judgment action, will pendent state claims have to be tried first before attorney fees paid and will city challenge court's award of fees without specific hearing on "substantially prevail" standard		
11/14/89	5.4	918.00
Read City's Notice of Appeal and Memorandum in Opposition to Plaintiff's Application for Award of Fees and Costs; 2 extended telephone conferences with attorney Bland about the merits of City's appeal, the proper appeal procedure and the possibility of settlement; analyze the merits of a cross appeal on Count I; review Rule 3(a) of the federal rules of appellate procedure, U.S.C. 1291 and 1292 and F.R.C.P. 54(b) as they apply to the City's appeal; read *Hewitt v. Helms* and *Rhodes v. Stewart* on proper standard for an award of attorney fees		

11/16/89 3.2 544.00
Obtain and read *Hallstrom v. Tillamook* decided by the U.S. Supreme Court on November 7, 1989; compare with 9th Circuit decision; analyze impact of decision on multiple notice issues in this case;

11/21/89 3.0 510.00
Outline issues to be addressed in plaintiffs' reply memorandum: plaintiff prevailed on merits, lodestar calculations were appropriate and a fee enhancement is appropriate; review standards set out in *Pennsylvania v. Delaware Valley* for fee enhancement; read *U.S.F.L. v. N.F.L.* on fee award determination; reanalyze application of these two cases to plaintiffs' fee application

11/22/89 1.5 255.00
Final edit of plaintiffs' reply memorandum; two phone conferences with attorney Bland on final edits; outline strategy for oral argument; review recent state efforts to force city to relocate landfill

12/04/89 0.5 85.00
phone conference with attorney Bland on fee application and state v city hearing

12/07/89 0.3 51.00
phone conference with attorney Bland

12/09/89 9.5 1615.00
Collect relevant case law, applicable memos and notes for fees hearing to be held on 12/11/89 in Rutland, Vermont; travel to Burlington, Vermont

12/10/89 6.0 1020.00
Prepare for tomorrow's hearing: review all primary case law, read all memoranda filed on fee award with supporting documents and reread

Hallstrom v Tillamook in anticipation of it being raised in tomorrow's hearing; phone conference with attorney Bland

12/11/89 9.5 1615.00
Travel to Rutland, Vermont; hearing before Judge Billings on fee application; read city's new motion and memorandum requesting dismissal of complaint based on *Hallstrom;* read and analyze city's supplemental memo in support of its opposition to plaintiffs' application for attorney's fees; read and analyze city's interrogatories and requests to produce regarding attorney's fees; further analysis of *Hallstrom* and other notice cases;

12/12/89 8.0 1360.00
Return to Arizona; outline responses to city's new motion for dismissal, discovery and supplemental memorandum of fees

12/15/89 1.5 255.00
lenghty [sic] phone conference with attorney Bland on city's dismissal motion, discovery and fees hearing; read Free Press articles on city's position on relocating dump and closure of landfill;

12/22/89 1.5 255.00
Read and edit draft of plaintiffs' memo in opposition to city's motion and memo for judgment or dismissal; also read and edit plaintiffs' reply in support of an award of fees and costs

12/27/89 1.0 170.00
Fax edits on drafts to attorney Bland; extended phone conference with attorney Bland on edits and "law of case" application

12/28/89 0.5 85.00
Phone conference with attorney Bland on timely filings and further hearings on motions

1/10/90 0.3 85.00
Phone conference with attorney Bland on city's supplemental memorandum in support of city's motion

1/15/90 1.0 170.00
Read and analyze city's supplemental memorandum; compare to *Hallstrom* language

3/04/90 0.2 34.00
Read attorney Bland letter to Dagues

3/16/91 2.0 340.00
Read and analyze Judge Billing's decision to deny the city's motion for judgment or dismissal focusing on *Hallstrom;* lengthy phone conference with attorney Bland about decision; phone conference with attorney Gallagher;

4/03/90 1.0 170.00
Read and analyze Judge Billing's decision granting plaintiffs' attorney fees; lengthy phone conference with attorney Bland

4/06/90 0.4 68.00
Phone conference with attorney Bland about fee award and city position on payment

4/07/90 0.3 51.00
Phone conference with attorney Bland on city's refusal to pay fee award presently

4/11/90 2.0 340.00
Review city's letter regarding payment of attorney's fees and request for interlocutory appeal by using F.R.A.P. 5 and 28 U.S.C. 1292(b); analyze strategy options; phone conference with attorney Bland

4/13/90 1.3 221.00
Read attorney Bland's letter; read and edit draft petition for enforcement of order; phone conference with attorney Bland

4/16/90 0.3 51.00
Phone conference with attorney Bland

4/19/90 0.3 51.00
Review attorney McKearin's letter on payment of Dr. Kaczmar's bill

4/20/90 0.3 51.00
Phone conference with attorney Bland on Kaczmar's bill and hearing on enforcement petition

4/26/90 1.5 255.00
Review city's memorandum in opposition to plaintiff's petition for enforcement of fee order and city's motion of entry of judgment and supporting memorandum; research applicability of Rule 54(b) to case; phone conference with attorney Bland

4/29/90 4.8 816.00
Detailed analysis of city's strategy to seek Rule 54(b) order thereby cutting off pendent state claims trial and payment of attorney's fees; research Rule 54(b) use

4/30/90 1.3 221.00
Review argument made in opposition to city motion; phone conference with attorney Bland on edits

William W. Pearson
77.5 hours at $170.00/hour = $13,175.00

Total Services Rendered $13,175.00

DISBURSEMENTS

DESCRIPTION	AMOUNT
Travel	254.22
Travel	458.00
Total 712.20	

FINAL SUMMARY

DESCRIPTION	AMOUNT
CURRENT FEES	13,175.00
CURRENT DISBURSEMENTS	712.20
CURRENT INVOICE TOTAL	$13,887.20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs-Appellees, v. CITY OF BURLINGTON, Defendant-Appellant	)	Docket No. 90-7544

AFFIDAVIT OF MICHAEL G. FURLONG

Michael G. Furlong, being duly sworn, deposes and states the following:

1.

I am a partner in the law firm of Sheehey Brue Gray & Furlong in Burlington, Vermont. I graduated from Middlebury College (B.A., 1973) and Cornell University (J.D., 1978), and I have been in practice in Burlington since 1978.

2.

Having practiced law in Burlington, Vermont for approximately thirteen years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

The customary billing rates for the attorneys in our firm range from $95 to $120 per hour. My customary billing rate is $120 per hour.

I understand that the current billing rate charged by William W. Pearson is $175 per hour.

I understand that the current billing rate charged by Richard N. Bland is $100 per hour, and that the billing rates for other attorneys in the firm of Downs Rachin [sic] & Martin range from $60 to $175 per hour, depending upon the level of experience.

Based upon my own firm's billing practices and hourly rates, and my general knowledge of the fees customarily charge by other attorneys in Burlington, Vermont, I believe that the hourly rates charge by Mr. Pearson and the hourly rates charged by attorneys in the firm of Downs Rachlin & Martin are within the range of hourly rates charge by attorneys in the Burlington area.

5.

Our firm engages in the general practice of law, with a majority of our work involving business and commercial matters.

Our firm does not do extensive plaintiffs' work on a contingency fee basis. When we do so, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return to the firm more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Michael G. Furlong
Michael G. Furlong

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 20th day of June, 1991.

/s/ Denise M. Longchamp
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiffs-Appellees,	)	
v.	)	Docket No. 90-7544
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT OF ROBERT A. MELLO

Robert A. Mello, being duly sworn, deposes and states the following:

1.

I am an attorney in South Burlington, Vermont. I graduated from St. John's Seminary in 1968 and Boston College (J.D., 1971), and I have been in practice in the Burlington area since 1975.

2.

Having practiced law in Burlington, Vermont for approximately 19 years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

My customary billing rate for fee-paying clients is $105-135 per hour.

4.

I am professionally and personally acquainted with William Pearson and Richard N. Bland, formerly with the law firm of Downs Rachlin & Martin, and I believe them to possess a high degree of knowledge and expertise in the field of environmental law.

5.

I understand that the current billing rate charged by Mr. Pearson is $170 per hour, and that charged by Mr. Bland is $100 per hour. I further understand that the billing rates for attorneys in the firm of Downs Rachlin & Martin range from $60-$175 per hour, depending upon the level of experience. I also understand that the billing rates for legal assistants in the firm of Downs Rachlin & Martin range from $50-$65 per hour, depending upon the level of experience.

Based upon my own hourly rate, and my general knowledge of the hourly rates charged by other attorneys and legal assistants in the Burlington area, I believe that the hourly rates charged by the law firm of Downs Rachlin & Martin are within the range of hourly rates charged by other law firms in the Burlington area.

6.

I engage in the general practice of law. When I take on plaintiffs' work on a contingency basis, the fees

charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Robert A. Mello
Robert A. Mello

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 21st day of June, 1991.

/s/ Joanne Aja Simpson
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiffs-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT OF JON R. EGGLESTON

Jon R. Eggleston, being duly sworn, deposes and states the following:

1.

I am a duly licensed attorney admitted to practice in Vermont. I received my B.A. from the University of Denver in 1968, my J.D. from Cornell University in 1971 and an LL.M. in Taxation in 1975 from the Georgetown University Law Center. I am admitted to practice before the U.S. District Court for the District of Vermont.

2.

I am a partner in the firm of Miller, Eggleston & Rosenberg in Burlington, Vermont and am engaged in general corporate law and taxation.

3.

Having practiced law in Vermont since 1971, I am familiar with hourly rates charged by law firms and attorneys in the Burlington area.

4.

I personally charge clients at the rate of $175- per hour.

5.

Based upon my own hourly rate, and my knowledge of the fees customarily charged by attorneys in this community, I believe that the current hourly rates charged by William W. Pearson and Richard N. Bland, $170 per hour and $100 per hour, are reasonable hourly rates for the Burlington legal market.

6.

My firm seldom represents plaintiffs on a contingency fee basis. This is because a contingent fee which will be equal only to our usual hourly rates offers no incentive for taking on such work. Indeed, it is my belief, based on my knowledge and experience of the Burlington legal community, that lawyers who take such contingency cases expect to recover a multiple of their usual hourly rate if they were to avail in the case. Without this expectation, there is no incentive for taking a contingency case.

/s/ Jon R. Eggleston
Jon R. Eggleston

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 24th day of June, 1991.

/s/ Kimberley A. Coon
Notary Public
Commission Expires 2-10-95

United States Court of Appeals
FOR THE SECOND CIRCUIT

Ernest Dague, Sr., Ernest Dague, Jr., Betty Dague, and Rose A. Bessette

v.

City of burlington

Use short title

90-7544
Docket Number

NOTICE OF MOTION

state type of motion

for Attorney Fees

MOTION BY: *(Name and tel. no. of law firm and of attorney in charge of case)*

William W. Pearson, Esq.
Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702

Heather Briggs, Esq.
Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402

OPPOSING COUNSEL: *(Name and tel. no. of law firm and of attorney in charge of case)*

Michael B. Clapp, Esq.
Dinse Erdmann & Clapp
P.O. Box 988
Burlington, VT 05402

Has consent of opposing counsel:

A. been sought? [ ] Yes [X] No

B. been obtained? [ ] Yes [X] No

Has service been effected? [X] Yes [ ] No

Is oral argument desired? [ ] Yes [X] No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:**

A. by scheduling order? [ ] Yes [ ] No

B. by firm date of argument notice? [ ] Yes [ ] No

C. If Yes, enter date: _____

Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? [ ] Yes [ ] No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? [ ] Yes [ ] No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? [ ] Yes [ ] No

** Second Circuit decision was issued June 12, 1991.

Brief statement of the relief requested:

Plaintiffs-Appellees request an award of attorney fees and expenses incurred in pursuing a successful appeal in this Court.

Complete Page 2 of This Form

By: *(signature of attorney)*

/s/ William W. Pearson/lb
William W. Pearson

/s/ Heather Briggs
Heather Briggs

Signed names must be printed beneath

_____

Appearing for: *(Name of party)*

Ernest Dague, Sr., Ernest Dague, Jr., Betty Dague, and Rose A. Bessette

Appellant or Petitioner:
[ ] Plaintiff [ ] Defendant

Appellee or Respondent:
[X] Plaintiff [ ] Defendant

Date

6/25/91

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied

_____

_____

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Attachment A.

Brief statement of the facts (*with page references to the moving papers*):

Attachment A.

Summary of the argument (*with page references to the moving papers*):

Attachment A.

ATTACHMENT A

Statement of the issue(s) presented by this motion:

To determine the amount of attorney fees and expenses to which plaintiffs-petitioners are entitled based on their successful appeal to this court.

Brief statement of the facts (with page references to the moving papers):

Plaintiffs brought suit in the United States District Court for the District of Vermont against the City of Burlington for alleged violations of state and federal laws arising out of the operation of a landfill. After a bench trial, the Court found that Defendant had operated a landfill in violation of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). The District Court found that the Defendant had operated the landfill in violation of open dumping practices, 42 U.S.C. § 6945(a); that the landfill may have presented a imminent and substantial endangerment to health or the environment, 42 U.S.C. § 6972(a) (1) (1b); and that the landfill had discharged pollutants into waters of the United States in violation of 33 U.S.C. § 1311. The District Court also found that Plaintiffs had substantially prevailed and awarded them attorney fees pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d). The Court also awarded Plaintiffs' expenses, including expert witness fees.

Defendant appealed from both the award of attorney fees and the denial by the District Court of a motion by the City to dismiss, made on the ground that Plaintiffs had failed to comply with the notice and delay requirements for citizen suits under 42 U.S.C. § 6972(a) and 33 U.S.C. § 1365(a).

This Court affirmed the District Court's judgment in all respects on June 12, 1991.

Summary of the argument (with page references to the moving papers):

Under RCRA and CWA, the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney fees and expenses. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d). Plaintiffs-petitioners respectfully request that, based upon the attached Affidavit of Counsel, Legal Memorandum and other supporting documents, attorney fees in the amount of $53,315.00 be awarded to plaintiffs-petitioners and that this amount should be enhanced 25% ($13,328.75) to $66,643.75. Plaintiffs-petitioners further request that attorney expenses be awarded in the amount of $2,240.34.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiffs-Appellees,	)	Docket NO. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS INCURRED ON APPEAL

Plaintiffs submit this application for their costs of litigation, including attorney fees and expenses, incurred in this action. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, provide that the prevailing or substantially prevailing party may be awarded costs of litigation, including reasonable attorney and expert witness fees. 42 U.S.C. § 6972(e); 33 U.S.C. § 1365(d).

On October 31, 1989, Plaintiffs submitted a fee application covering fees and expenses through that date, but *excluding* items properly includable on a bill of costs. On April 2, 1990, the district court ordered an interim award of $247,534.37, including a 25% risk enhancement. An interlocutory appeal was filed by Defendant. This Court affirmed the District Court's order on June 12, 1991. Plaintiffs now seek to recover fees incurred during this appeal. In support of this application, Plaintiffs submit

affidavits and other documentation to substantiate the requested fees and expenses.

WHEREFORE, Plaintiffs respectfully request that, based upon the attached affidavits of counsel, legal memorandum and other supporting documents, supplemental attorney fees in the amount of $53,315.00 be awarded to Plaintiffs and that this amount be enhanced 25% ($13,328.75) pursuant to *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987), *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984) and the district court's order of April 2, 1990, for a total of $66,643.75. Plaintiffs further request that the Court award $2,240.34 for attorney expenses incurred in this matter plus interest at the prevailing federal rate, 28 U.S.C. § 1961, from the date of judgment to the date of payment.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs

Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs-Appellees,	)	Docket NO. 90-7544
v.	)	
CITY OF BURLINGTON, Defendant-Appellant	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

Plaintiffs submit this memorandum in support of their supplemental application for attorneys fees and expenses.

I. Statement of Facts

Plaintiffs Ernest Dague, Sr. Ernest Dague, Jr., Betty Dague and Rose A. Bessette brought this action against the City of Burlington, Vermont ("the City") for alleged violations of federal and state law arising out of the operation of the Burlington Municipal Disposal Grounds ("the Landfill"). Plaintiffs commenced this action under the citizen suit provisions of the Resource Conservation

and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, and the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and under pendent state claims. Plaintiffs sought injunctive relief, imposition of civil penalties, compensatory and punitive damages for their pendent state claims, costs, and attorneys fees.

After a bench trial, the Court issued its Findings of Fact, Opinion and Order, finding Defendant liable on four of the five statutory counts of Plaintiffs' Complaint. Thereafter, "[h]aving determined that plaintiffs have substantially prevailed in both their RCRA and CWA claims," the district court assessed fees and expenses in the amount of $247,534.37. The Defendant appealed and this Court affirmed the judgment of the district Court. Plaintiffs now move for an award of their costs of defending their judgment on appeal, including attorney fees and expenses incurred in this action.

II. Argument and Authority

The starting point for any calculation of attorneys fees is the "lodestar," the product of a reasonable hourly rate and the number of hours reasonably expended on substantive issues on which the petitioner satisfies the statutory threshold of success. *Sierra Club v. EPA*, 769 F.2d 796, 23 ERC 1001, 1002 (D.C. Cir. 1985; *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). After the lodestar is calculated, a determination must be made as to whether any enhancement of the lodestar is appropriate. *Sierra Club*, 769 F.2d at 809-10.

A. Calculation of the Lodestar

This Court has already determined that Plaintiffs have substantially prevailed on their federal claims, thereby entitling them to a fully compensatory fee award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). All that remains to be decided is whether the additional fees sought by Plaintiffs are based on "reasonable" rates and "reasonable" hours. "In computing the fee, counsel for [Plaintiffs as] prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " *Save Our Sound Fisheries Association v. Callaway*, 429 F.Supp. 1136, 1147 (D.R.I. 1977) (analysis utilized in civil rights actions applicable to environmental cases) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 6 (1976)).

Plaintiffs' attorneys have submitted two affidavits stating their rates are those usually charged to clients who pay on an hourly basis, (Exhibits 1 and 2), as well as affidavits from other attorneys in Burlington, Vermont stating that the applicable rates for Downs Rachlin & Martin attorneys (and for Mr. Pearson, who is currently practicing in Tucson, Arizona in the field of environmental law and whose current billing rate is $170 per hour), are reasonable. (Exhibits 3, 4 and 5). *Blum v. Stenson*, 465 U.S. 886 (1989). Plaintiffs' application is further supported by itemized contemporaneous records for all time expended. (Exhibits 1 and 2). The descriptive entries show that all time spent was reasonably necessary.

Accordingly, Plaintiffs submit that the appropriate lodestar is $53,315.00 in attorneys fees.

B. Enhancing the Lodestar

The next step to consider is whether an enhancement of the lodestar amount is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) ("Delaware Valley II"); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (7th Cir. 1984). An enhancement is appropriate here.

The purpose behind applying an enhancement or multiplier is to attract competent counsel. *SPIRG of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 27 ERC 1409, 1421 (3rd Cir. 1988); *Delaware Valley II*, 107 S.Ct 3078 (1987). Simply stated, if plaintiffs' attorneys can receive as a *maximum* only the lodestar amount, after risking complete nonpayment as well as the hardships imposed by delay, lack of cash-flow, and out-of-pocket expenses, then competent counsel will be reluctant to serve on behalf of private attorneys general. The purpose underlying the "multiplier" is to balance the inherent inequities between plaintiffs and fee-paying defendants and to reward attorneys who take on public interest cases and achieve substantial results.

In this case, the Court has already determined that the enhancement of 25 percent ordered by the district court is appropriate. Accordingly, Plaintiffs request that the fees expended on appeal also be enhanced by the same amount.

C. Expenses

In addition to attorneys fees, Plaintiffs request that they be awarded reasonable expenses not otherwise

recoverable in a bills of costs,[1] incurred in this action. Plaintiffs counsel has attached an affidavit setting forth that these expenses were necessary and reasonably incurred and has attached copies of applicable bills and receipts, totalling $2,240.34. (Exhibits 1 and 2). Accordingly, Plaintiffs request that this amount also be awarded.

An award of costs in this case is not limited to those normally allowed pursuant to 28 U.S.C. § 1920 or F. R. Civ. P. 54. While there are few environmental cases on this point, case law developed under other fee-shifting statutes instructs that all reasonable out-of-pocket expenditures are to be awarded. *Shorter v. Valley Bank and Trust Co.*, 678 F.Supp. 714, 726 (N.D. Ill 1988) (FLSA); *Reichman v. Bonsignore & Mazzotta*, 818 F.2d 278 (2d Cir. 1987) (citing *Laffey v. Northwest Airlines, Inc.*, 747 F.2d 4, 30 (D.C. Cir. 1984)); *Herold v. Hajoca Corp.*, 864 F.2d 317, 323 (4th Cir. 1988) (ADEA); *Kossman v. Calcumet* [sic] *County*, 849 F.2d 1027, 1030 (7th Cir. 1988) (ADEA); *Hidle v. Geneva County Board of Education*, 681 F. Supp. 752, 758 (D.C. Ala. 1988); *Laffey*, 746 F.2d at 30; *Thompson v. Sawyer*, 586 F.Supp. 635, 643 (D.D.C. 1984) (Title VII); *Planells v. Howard University*, ___ F.Supp. ___, 34 FEP 66, 71 (D.C.D.C.-1984) (Title VII); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 289 (N.D. Ill 1983) (ADEA).

Courts addressing claims under environmental protection statutes have stated that the general policies underlying awards of fees and expenses in civil rights cases apply to similar fee requests and under environmental statutes. *See, e.g., Pennsylvania v. Delaware Valley*

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[1] Plaintiffs have submitted a separate Bill of Costs.

Citizens' Council for Clean Air, 106 S.Ct. 3088, 24 E.R.C. 1577 (1986) (*"Delaware Valley I"*); *SPIRG of New Jersey v. AT&T*, 842 F.2d 1436, 1439 n.1 (3rd Cir. 1988); *Save Our Sound Fisheries Association v. Callaway*, 429 F. Supp. 1136 (D.R.I. 1977).

Courts resolving fee issues under the Clean Air Act, 42 U.S.C. § 7607(f), a fee shifting statute substantially similar to the fee shifting provision in RCRA and the CWA, (*SPIRG of New Jersey*, 842 F.2d at 1439 n.1) have awarded costs similar to those requested by Plaintiffs here. *Sierra Club v. EPA*, 769 F.2d 796, 812 (D.C. Cir. 1985) (awarding telephone, photocopying, postage costs); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 6-8 (D.C. Cir. 1982) (travel, postage, copies of legislative history and transcript expenses awarded). All expenses requested by Plaintiffs are therefore reimbursable.

D. Interest

Plaintiffs are entitled to an award of interest pursuant to 28 U.S.C. § 1961.

III. CONCLUSION

Plaintiffs respectfully request the Court to award attorneys fees in the amount of $53,315.00, to enhance said fees 25% (for a total fee award of $66,643.75), to award $2,240.34 for expenses, such fees and expenses relating directly to the appeal to this Court, and post-judgment interest at the rate of 6.09% from June 12, 1991 to the date of payment by the Defendant.

Burlington, Vermont. June 25, 1991.

Attorneys for Plaintiffs-
Appellees

By: /s/ William W. Pearson
William W. Pearson

Molloy, Jones & Donahue
P.O. Box 2268
Tucson, AR 85702
(602) 622-3531

By: /s/ Heather Briggs
Heather Briggs
Downs Rachlin & Martin
P.O. Box 190
Burlington, VT 05402
(802) 863-2375

Not reproduced is original documentation (invoices, receipts, etc.) of expenses and disbursements totalling $2240.34, the amount of which is not disputed.

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE, Plaintiffs-Appellees, v. CITY OF BURLINGTON, Defendant-Appellant	Docket NO. 90-7544

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS ON APPEAL

STATE OF VERMONT)
CHITTENDEN COUNTY) SS.

Heather Briggs, being duly sworn, deposes and states as follows:

1.

I am an attorney in the law firm of Downs Rachlin & Martin, attorneys for Plaintiffs in this action. This affidavit provides the specification and itemization necessary for recovery of costs of litigation, including reasonable attorney fees and expenses, pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2.

Attached hereto as Exhibit 1 are the billing statements by this law firm for legal services performed in this appeal. These billings are accurate and true representations of work actually performed, compiled from time slips prepared by the attorney or legal assistant performing the work described. Time slips are prepared by each attorney and legal assistant on a daily basis and reflect actual time spent on the matter, as well as a description of the work performed. As shown in Exhibits 1 and 2, the total amount of Plaintiffs' attorneys fees incurred from May 7, 1990 to present is $53,315.00.

3.

Attached are copies of the expense receipts incurred in this Court, exclusive of amounts relating to the appeal and of any amount to be included in Plaintiffs' Bill of Costs. These receipts are accurate and true representations of expenses actually incurred and total $1,453.00. Certain other expenses were also necessarily incurred for which no receipts are available: (1) telephone $199.50; (2) postage $351.20; (3) Travel $137.75; (4) computer legal research $26.39; (5) photography $3.00; and (6) copying $69.50.[1] These expenses total $787.34. Thus, total expenses per Exhibits 1 and 2, not otherwise recoverable in a Bill of Costs are $2,240.34.

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[1] The practice of Downs Rachlin & Martin is to pass necessarily incurred litigation expenses on to fee-paying clients and not to increase hourly rates to absorb such expenses.

4.

William W. Pearson served as lead counsel for Plaintiffs in this matter. He was first admitted to the Indiana Bar and the U.S. District Court, Southern District of Indiana, in 1971; the Vermont Bar in 1975; the U.S. District Court, District of Vermont, in 1977; the U.S. Court of Appeals, Second Circuit, in 1986; the Arizona Bar and the U.S. District Court, District of Arizona, in 1989. He received his undergraduate degree from University of Chicago in 1968. He then attended Georgetown University Law Center where he received his J.D. in 1971. He is presently a member of the Arizona, Vermont and American Bar Associations.

Mr. Pearson is an experienced trial attorney in the field of environmental law. His experience with environmental legal problems includes hazardous waste management, toxic torts, NPDES permits, landfills, hazardous waste risk management and commercial lending, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

5.

Richard Bland assisted Mr. Pearson in this matter. Mr. Bland was first admitted to the Vermont Bar in 1985; the U.S. District Court, District of Vermont, in 1986; and the Supreme Court of the United States in 1989. Mr. Bland received his undergraduate degree from University of Vermont in 1982. He then attended Washington University School of Law where he received his J.D. in 1985. Mr.

Bland is presently a member of the Chittenden County, Vermont and American Bar Associations.

Mr. Bland was, during his employment with this firm, a trial attorney whose practice was primarily in the field of environmental law. He has experience in resolving environmental legal problems involving hazardous waste management, including the generation, transportation, storage and disposal of hazardous waste, landfills, RCRA, CWA, Superfund, asbestos, underground storage tanks, hazardous waste risk management and commercial lending, and insurance coverage for environmental claims.

6.

Based upon personal knowledge of hourly rates charged by other attorneys in the Burlington area with similar experience, reputation and skill, I know that rates from $100 – $175 per hour are routinely charged. As shown in Exhibit 1, there are varying levels of rates charged by the law firm of Downs Rachlin & Martin. Work performed by partners is billed at $100 – $175 per hour. Work performed by associates is billed at $65 – $110 per hour, depending on the level of experience. The following is a list of each attorney and legal assistant who worked on this case, the amount of time they spent on this appeal, and their hourly rates:

James C. Gallagher	2.60	HOURS AT	145.00/HR	
			=	377.00
Heather Briggs	22.70	HOURS AT	145.00/HR	
			=	3,291.50

Richard N. Bland	0.90	HOURS AT	110.00/HR	
			=	99.00
Richard N. Bland	256.80	HOURS AT	90.00/HR	
			=	23,112.00
Anita R. Tuttle	14.20	HOURS AT	90.00/HR	
			=	1,278.00
Michael J. Case	8.90	HOURS AT	60.00/HR	
			=	534.00
Michael J. Case	2.70	HOURS AT	55.00/HR	
			=	148.50
Keith E. Wexelblatt	7.20	HOURS AT	35.00/HR	
			=	252.00

7.

In order to substantiate that the requested hourly rates are reasonable, attached are Exhibits 3, 4 and 5 which are affidavits from attorneys in the Burlington area which set forth their respective billing rates and further indicate the hourly rates for counsel with similar experience, reputation and skill.

8.

The environmental practice at Downs Rachlin & Martin has been limited to representing fee-paying clients, because of the risk associated with the representation of private attorneys general and plaintiffs on a contingency fee basis. Thus, most of the hours spent on this matter would have been spent representing other clients who would pay our hourly rates on a monthly basis.

Nevertheless, all work associated with Defendant's statutory liability was taken on a contingent basis: had Plaintiffs not prevailed on their statutory claims, counsel for Plaintiffs would not be compensated at all for their services on these claims. In fact, to date, this firm has not received any payment for its services.

An important factor in this firm's decision to pursue Plaintiffs' statutory claims was the opportunity to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount. This incentive, in my professional opinion, is necessary to attract competent counsel to represent private attorneys general in public interest litigation. Accordingly, I am of the opinion that Plaintiffs would have faced extreme difficulties in finding other local counsel of similar experience to pursue their claims under RCRA and the CWA on an hourly rate to be paid only on the contingency of success.

6-25-91
Date

/s/ Heather Briggs
Heather Briggs

Sworn to and subscribed before me this 25th day of June, 1991.

/s/ Anita R. Tuttle
Notary Public
Commission Expires: 2-10-95

DOWNS RACHLIN & MARTIN, PROF. CORP
9 PROSPECT STREET
POST OFFICE BOX 99
ST. JOHNSBURY, VT 05819-0099

June 24, 1991

MRS. ERNEST DAGUE
272 MANHATTAN DRIVE
BURLINGTON, VT 05401

FILE NUMBER: 23690001

DRAFT NUMBER: 1.002

FOR THE PERIOD THROUGH June 24, 1991

DAGUE V. CITY OF BURLINGTON

Sample Entry –

Date:	Atty:	Hours:	Amount:
Description of Services:			
05/08/90	RNB	3.50	315.00
REVIEW AND ANALYZE COURT'S ORDER OF 4 MAY 1990 AND JUDGMENT OF 7 MAY 1990; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND ANALYZE ISSUES FOR CROSS APPEAL; REVIEW FEDERAL RULES OF APPELLATE PROCEDURE AND RULES APPLICABLE TO APPEALS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT.			
05/09/90	RNB	2.00	180.00
LEGAL RESEARCH ON ABILITY OF CITIZENS TO ENFORCE FEDERAL RCRA HAZARDOUS WASTE REQUIREMENTS AND REGULATIONS WHEN STATE HAS RECEIVED EPA – AUTHORIZATION TO ADMINISTER A HAZARDOUS WASTE PROGRAM.			

05/10/90 RNB 4.30 387.00
LEGAL RESEARCH ON CITIZEN SUITS UNDER RCRA IN STATES WITH EPA-APPROVED HAZARDOUS WASTE PROGRAMS; LEGAL RESEARCH ON ASSESSING CIVIL PENALTIES UPON VIOLATIONS OF CWA AND RCRA; LEGAL RESEARCH ON PRECLUSION OF CITIZEN SUIT UNDER RCRA AND CWA BY DILIGENT PROSECUTION OF ACTION BY GOVERNMENT AUTHORITY TO REQUIRE COMPLIANCE WITH THE ACTS.

05/17/90 RNB 0.50 45.00
FURTHER ANALYSIS OF COURT'S FINDINGS OF FACT, OPINION AND ORDER OF OCTOBER 15, 19[illegible] REGARDING HAZARDOUS WASTE PE[illegible]MIT AND NOTIFICATION REQUIREMENTS OF RCRA

05/23/90 RNB 0.50 45.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEASON [sic] REGARDING CROSS-APPEAL ISSUES.

05/24/90 RNB 1.50 135.00
LEGAL RESEARCH UNDER VERMONT LAW REGARDING REQUIREMENTS FOR HAZARDOUS WASTE DISPOSAL FACILITIES.

05/31/90 RNB 2.80 252.00
LEGAL RESEARCH ON ASSESSMENT OF CIVIL PENALTIES UPON A VIOLATION OF CLEAN WATER ACT.

06/05/90 RNB 3.80 342.00
LEGAL RESEARCH ON STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TSD FACILITIES, INCLUDING POST-CLOSURE PERMITTING REQUIREMENTS FOR SUCH FACILITIES;

LEGAL RESEARCH ON NOTICE PROVISIONS OF RCRA AND THE APPLICATION OF PRIMARY JURISDICTION AND COLLATERAL ESTOPPEL DOCTRINES TO CITIZENS SUITS UNDER FEDERAL ENVIRONMENTAL STATUTES.

06/06/90 RNB 1.00 90.00
REVIEW CITY'S NOTICE OF APPEAL; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PROCEDURE AND ISSUES ON APPEAL; DRAFT NOTICE OF CROSS APPEAL.

06/08/90 RNB 4.80 432.00
TELEPHONE CONFERENCE WITH MS. CHRISTINE BAKER, APPEALS COORDINATOR, REGARDING FILING DATE OF CITY'S NOTICE OF APPEAL AND FILING FEE FOR A CROSS APPEAL; FURTHER REVIEW AND ANALYSIS OF COURT'S FINDINGS OF FACT, OPINION AND ORDER OF OCTOBER 17, 1989; FURTHER ANALYZE LUTZ CASE REGARDING CITIZEN SUITS UNDER EPA AUTHORIZED STATE HAZARDOUS WASTE PROGRAM; REVIEW PLAINTIFFS' PROPOSED FINDINGS OF FACT AND TRIAL MEMORANDUM; REVIEW DOCKET ENTRIES; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CROSS APPEAL ISSUES.

06/11/90 RNB 2.70 243.00
DRAFT STATEMENT OF ISSUES PROPOSED TO BE RAISED ON CROSS APPEAL FROM APPELLATE FORM C; LETTER TO ATTORNEY PEARSON REGARDING SAME; REVIEW

ATTORNEY MCKEARIN'S 8 JUNE 1990 LETTER TO MR. CURRIE REGARDING TRANSCRIPT OF TRIAL AND REVIEW CITY'S FORM D REGARDING TRANSCRIPT INFORMATION; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME, AND CERTIFICATION OF COURT'S ORDERS OF OCTOBER 17, 1990 AND APRIL 2, 1990 AND CITY'S POSSIBLE WAIVER OF NOTICE ISSUE.

06/18/90 RNB 3.30 297.00
REVIEW ATTORNEY MCKEARIN'S 14 AND 15 JUNE 1990 LETTERS TO MS. GOLDSMITH; REVIEW AND ANALYZE CITY'S FORM C, CIVIL APPEAL PRE- ARGUMENT STATEMENT; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND WHETHER OR NOT TO CROSS APPEAL; FURTHER LEGAL RESEARCH ON RULE 54(B) CERTIFICATION REGARDING APPELLATE REVIEW OF ORDERS NOT CERTIFIED.

06/19/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING DECISION TO FILE CROSS APPEAL.

06/20/90 RNB 0.40 36.00
EXTENDED TELEPHONE CONFERENCE WITH MS. PEGGY MULHERN OF SIERRA CLUB REGARDING ITS POSSIBLE INTERVENTION ON APPEAL AS AMICUS CURIAE.

06/21/90 RNB 0.40 36.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING POSSIBLE INTERVENTION ON APPEAL BY

SIERRA CLUB AND TIMING OF AND PROCEDURE ON APPEAL.

06/22/90 RNB 3.30 297.00
DESIGNATE DOCUMENTS FROM DOCKET ENTRIES AND SELECT EXHIBITS TO BE INCLUDED IN RECORD ON APPEAL; COMPILE RELEVANT DOCUMENTS FOR PARTIES' JOINT APPENDIX.

06/25/90 RNB 0.80 72.00
REVIEW PRE-ARGUMENT CONFERENCE NOTICE, CIVIL APPEAL SCHEDULING ORDER #1; DIARY CALENDAR REGARDING SAME; TELEPHONE CONFERENCE WITH ATTORNEY ROBERT MCKEARIN REGARDING POSTPONEMENT OF PRE-ARGUMENT CONFERENCE.

06/26/90 RNB 1.30 117.00
REVIEW ATTORNEY MCKEARIN'S 25 JUNE 1990 LETTER TO MR. STANLEY BASS REGARDING COURT'S ORDER OF MAY 4, 1990, AND POSTPONEMENT OF PRE-ARGUMENT CONFERENCE AND EXTENSION OF DEADLINES IN SCHEDULING ORDER; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; COMPLETE NOTICE OF APPEARANCE; LETTER TO ATTORNEY PEARSON REGARDING SAME.

06/27/90 RNB 0.20 18.00
TELEPHONE CONFERENCE WITH CLERK OF COURT OF APPEALS REGARDING PRE-ARGUMENT CONFERENCE.

06/29/90 RNB 0.80 72.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING PRE-ARGUMENT CONFERENCE, CIVIL APPEAL SCHEDULING

ORDER #1, AND COMPOSITION OF RECORD ON APPEAL; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

07/02/90 RNB 0.70 63.00
REVIEW AND ANALYZE SECOND PRE-ARGUMENT CONFERENCE NOTICE FROM SECOND CIRCUIT COURT OF APPEALS; REVIEW JUDGE BILLINGS' 4 MAY 1990 ORDER IN LIGHT OF SAME.

07/03/90 RNB 0.50 45.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SECOND PRE-ARGUMENT CONFERENCE NOTICE AND 54(B) CERTIFICATION.

07/05/90 RNB 5.30 477.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING SCHEDULING ORDER AND COMPILATION OF RECORD ON APPEAL; FOLLOW-UP TELEPHONE CONFERENCE WITH CLAPP REGARDING SELECTION OF DOCUMENTS FROM DOCKET ENTRIES AND EXHIBITS FOR RECORD ON APPEAL; TELEPHONE CONFERENCE WITH MR. WILLIAM CURRIE REGARDING TRANSCRIPT OF TRIAL; THOROUGH PREPARATION FOR DISCUSSION OF ALL ISSUES IN PRE-ARGUMENT CONFERENCE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING ATTORNEY PEARSON'S 4 NOVEMBER 1985 AFFIDAVIT, CERTIFIED COPY OF DOCKET ENTRIES, AND LIST OF EXHIBITS; LETTER TO ATTORNEY CLAPP REGARDING EXHIBIT LISTS.

07/06/90 RNB 2.30 207.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF RECORD ON APPEAL AND JOINT APPENDIX; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE.

07/09/90 RNB 3.30 297.00
BRIEF TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR PRE-ARGUMENT CONFERENCE; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE.

07/10/90 RNB 3.80 342.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON IN PREPARATION FOR PRE-ARGUMENT CONFERENCE; CONTINUE TO PREPARE FOR PRE-ARGUMENT CONFERENCE; ATTEND PRE-ARGUMENT CONFERENCE BY TELEPHONE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; REVIEW AND DESIGNATE DOCKET ENTRIES AND EXHIBITS FOR INCLUSION IN THE JOINT APPENDIX.

07/11/90 RNB 1.80 162.00
TELEPHONE CONFERENCE WITH MR. WILLIAM CURRIE REGARDING TRANSCRIPT OF TRIAL; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPLETION OF TRANSCRIPT, RECORD ON APPEAL, AND JOINT APPENDIX; STATUS REPORT TO ATTORNEY GALLAGHER REGARDING PRE-ARGUMENT CONFERENCE; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF

RECORD ON APPEAL; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP AND MR. BASS REGARDING EXTENSION OF DEADLINES FOR FILING BRIEFS.

07/12/90 RNB 6.00 540.00
CONTINUE TO PREPARE FOR APPEAL, INCLUDING ANALYSIS OF AND LEGAL RESEARCH ON ISSUES PROPOSED TO BE RAISED ON APPEAL BY CITY; LETTER TO ATTORNEY CLAPP REGARDING RECORD; REVIEW AND ANALYZE VOL. I OF TRANSCRIPT OF TRIAL.

07/13/90 RNB 5.50 495.00
TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING COMPOSITION OF RECORD ON APPEAL AND CITY'S INTENT TO APPEAL DISMISSAL OF THIRD-PARTY DEFENDANTS; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME AND REVISED SCHEDULING ORDER; REVIEW AND ANALYZE VOLUME II OF TRANSCRIPT OF TRIAL.

07/14/90 RNB 4.70 423.00
REVIEW AND ANALYZE VOLUMES III AND IV OF TRANSCRIPT OF TRIAL.

07/16/90 RNB 5.30 477.00
REVIEW ATTORNEY CLAPP'S 13 JULY 1990 LETTER TO MS. BARBER REGARDING RECORD ON APPEAL; LETTER TO ATTORNEY PEARSON REGARDING SAME AND NOTICE OF APPEARANCE; FURTHER REVIEW AND ANALYSIS OF TRANSCRIPT OF TRIAL.

07/17/90 RNB 4.30 387.00
REVIEW DESIGNATED RECORD ON APPEAL AS SUBMITTED BY MS. CHRISTINE BARBER;

LETTER TO ATTORNEY CLAPP REGARDING JOINT APPENDIX; CONTINUE TO PREPARE FOR APPEAL.

07/18/90 RNB 4.00 360.00
CONTINUE TO REVIEW AND ANALYZE RECORD ON APPEAL.

07/19/90 RNB 4.30 387.00
SELECT TRANSCRIPT EXCERPTS FOR INCLUSION IN THE JOINT APPENDIX; TELEPHONE CONFERENCE WITH MR. CLAPP'S OFFICE REGARDING PLAINTIFFS-APPELLEES' DESIGNATION OF CONTENTS OF THE JOINT APPENDIX; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING SAME, CITY'S INTENT TO RAISE ISSUE OVER DISMISSAL OF THIRD-PARTY DEFENDANTS, AND CITY'S INTENT TO REQUEST ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF; CONTINUE TO REVIEW AND ANALYZE RECORD ON APPEAL.

07/20/90 RNB 2.80 252.00
LETTER TO ATTORNEY PEARSON; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING NOTICE OF APPEARANCE, CONTENTS OF JOINT APPENDIX AND FILING DEADLINES; FURTHER REVIEW AND ANALYSIS OF PLAINTIFFS' TRIAL MEMORANDUM.

07/21/90 RNB 0.40 36.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEYS MCKEARIN AND CLAPP REGARDING CITY'S REQUEST FOR ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF.

07/23/90 RNB 1.30 117.00
LETTER TO MRS. GOLDSMITH REGARDING FILING OF NOTICE OF APPEARANCE FOR PLAINTIFFS-APPELLEES; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S DESIGNATION OF DOCKET ENTRIES FOR INCLUSION IN JOINT APPENDIX; TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN AND STAFF COUNSEL REGARDING CITY'S REQUEST FOR ANOTHER EXTENSION OF TIME TO FILE AND SERVE ITS BRIEF; BRIEF FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN REGARDING CITY'S SUPPLEMENTAL DESIGNATION OF DOCKET ENTRIES FOR INCLUSION IN RECORD ON APPEAL.

07/24/90 RNB 1.00 90.00
LETTER TO ATTORNEY PEARSON REGARDING REVISED SCHEDULING ORDER FOR CITY TO FILE AND SERVE ITS BRIEF; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP'S OFFICE REGARDING JUDGE BILLINGS' ORDER DENYING CITY'S MOTION TO JOIN ADDITIONAL DEFENDANTS; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING SAME, FILING DEADLINES AND JOINT APPENDIX.

07/26/90 RNB 4.30 387.00
REVIEW CONTENTS OF JOINT APPENDIX, VOL. I – DOCKET ENTRIES AND VOL. II – TRANSCRIPTS, AND EXHIBITS; REVIEW AND ANALYSIS OF CITY'S BRIEF.

07/27/90 RNB 9.80 882.00
CONTINUE TO REVIEW AND ANALYZE CITY'S BRIEF; REVIEW CIVIL APPEAL SCHEDULING ORDER #2.

07/30/90 RNB 4.30 387.00
REVIEW MS. BARBER'S 27 JULY 1990 LETTER TO MRS. GOLDSMITH REGARDING FIRST SUPPLEMENT TO RECORD ON APPEAL; FURTHER REVIEW AND ANALYSIS OF CITY'S BRIEF; DRAFT STATEMENT OF ISSUES AND NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION OF THE CASE BELOW OF STATEMENT OF THE CASE SECTION FOR APPELLEE'S BRIEF.

07/31/90 RNB 5.80 522.00
REVIEW ATTORNEY CLAPP'S 27 JULY 1990 LETTER TO MS. GOLDSMITH REGARDING FILING OF CITY'S BRIEF; CONTINUE TO DRAFT COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW SECTIONS OF THE STATEMENT OF THE CASE FOR APPELLEE'S BRIEF; REVISE SAME.

08/01/90 RNB 4.30 387.00
BEGIN TO DRAFT STATEMENT OF THE FACTS SECTION OF THE STATEMENT OF THE CASE OF APPELLEE'S BRIEF.

08/02/90 RNB 2.80 252.00
CONTINUE TO DRAFT STATEMENT OF THE FACTS SECTION OF APPELLEES' BRIEF.

08/03/90 RNB 4.80 432.00
CONTINUE TO DRAFT AND REVISE STATEMENT OF THE FACTS SECTION OF APPELLEES' BRIEF; REVISE STATEMENT OF THE CASE OF APPELLEES' BRIEF; EXTENDED

TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S BRIEF AND APPELLEES' RESPONSE THERETO.

08/04/90 RNB 4.30 387.00
LEGAL RESEARCH ON COMPLIANCE WITH REGULATIONS PROMULGATED UNDER RCRA AND THE CWA REGARDING NOTICE; FURTHER LEGAL RESEARCH ON PRECLUSION OF CITIZENS' SUIT BY ADMINISTRATIVE ACTION.

08/06/90 RNB 3.50 315.00
FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT I OF ITS BRIEF, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 21 FEBRUARY 1986, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 30 OCTOBER 1986, AND JUDGE BILLINGS' OPINION AND ORDER DATED 15 MARCH 1990.

08/07/90 RNB 9.50 855.00
CONTINUE LEGAL RESEARCH AND ANALYSIS OF DELAY PERIODS OF CITIZEN SUIT PROVISIONS UNDER RCRA AND THE CWA; BEGIN TO DRAFT ARGUMENT I OF APPELLEES' BRIEF, THAT THE DISTRICT COURT CORRECTLY FOUND THAT THE LANDOWNERS GAVE THE REQUISITE PRE-SUIT NOTICE TO VEST IF WITH JURISDICTION OVER THEIR ACTION.

08/07/90 MJC 1.50 82.50
TELEPHONE CONFERENCE WITH DON BESSETTE REGARDING CITY'S PLAN TO PUT PEDESTRIAN PATH ON PROPERTY; TELEPHONE CONFERENCE WITH LAUREL BESSETTE REGARDING SAME; TELEPHONE

CONFERENCE WITH CITY PARKS DEPARTMENT REGARDING SAME; MEMORANDUM TO ATTORNEY BLAND REGARDING SAME.

08/08/90 RNB 8.50 765.00
CONTINUE TO DRAFT ARGUMENT I OF APPELLEES' BRIEF; FURTHER REVIEW AND ANALYSIS OF MAGISTRATE'S REPORT AND RECOMMENDATION DATED 18 APRIL 1988; REVISE ARGUMENT I OF APPELLEES' BRIEF.

08/09/90 RNB 6.50 585.00
FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT II OF ITS BRIEF, MAGISTRATE'S REPORT AND RECOMMENDATION DATED 21 FEBRUARY 1986, JUDGE BILLINGS' OPINION AND ORDER DATED 26 MARCH 1986 AND HIS FINDINGS OF FACT, OPINION AND ORDER DATED 16 OCTOBER 1989; LEGAL RESEARCH ON DISCHARGE OF POLLUTANTS FROM A POINT SOURCE UNDER THE CWA.

08/13/90 RNB 13.30 1,197.00
DRAFT ARGUMENT II OF APPELLEE'S BRIEF THAT THE DISTRICT COURT CORRECTLY HELD THAT THE RAILROAD CULVERT IS A POINT SOURCE FOR THE DISCHARGE OF POLLUTANTS FROM THE LANDFILL INTO WATERS OF THE UNITED STATES; ANALYZE AND REVISE SAME; FURTHER REVIEW AND ANALYSIS OF CITY'S ARGUMENT III IN ITS BRIEF AND JUDGE BILLINGS' OCTOBER 16, 1989 OPINION REGARDING COUNT III OF PLAINTIFFS' COMPLAINT.

08/13/90 MJC 1.20 66.00
TELEPHONE CONFERENCE WITH BOB WHATEN AT CITY PARKS DEPARTMENT REGARDING CITY PLANS FOR RIGHT-OF-

WAY; CONFERENCE WITH ATTORNEY BLAND REGARDING SAME; TELEPHONE CONFERENCE WITH LAUREL AND BRIAN BESSETTE REGARDING SAME.

08/14/90 RNB 9.50 855.00
DRAFT ARGUMENT III OF APPELLEES' BRIEF THAT THE DISTRICT COURT CORRECTLY HELD THAT THE LANDFILL MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO THE ENVIRONMENT IN VIOLATION OF 42 U.S.C. § 6972(A)(1)(B); EXTENSIVE ANALYSIS OF AN REVISE SAME.

08/15/90 RNB 8.80 792.00
FURTHER REVIEW AND ANALYSIS OF ARGUMENT IV OF CITY'S BRIEF; DRAFT ARGUMENT IV A. OF APPELLEE'S BRIEF; ANALYZE AND REGARDING SAME.

08/16/90 RNB 9.30 837.00
FURTHER REVIEW AND ANALYSIS OF ARGUMENT IV OF CITY'S BRIEF; DRAFT ARGUMENT IV B. OF APPELLEES' BRIEF; EXTENSIVE ANALYSIS AND REVISION OF SAME; DRAFT CONCLUSION, TABLE OF CONTENTS AND TABLE OF AUTHORITIES OF APPELLEES' BRIEF; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING APPELLEES' BRIEF.

08/17/90 RNB 1.70 153.00
EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISION OF APPELLEES' BRIEF; FURTHER REVIEW AND ANALYSIS OF APPELLEES' BRIEF.

08/18/90 RNB 3.80 342.00
FOLLOW-UP EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON

REGARDING REVISIONS TO APPELLEES' BRIEF; REVISE APPELLEES' BRIEF; DRAFT LETTER TO MRS. GOLDSMITH REGARDING FILING AND SERVICE OF APPELLEES' BRIEF; DRAFT CERTIFICATE OF SERVICE.

08/20/90 RNB 2.30 207.00
CONTINUE TO REVISE APPELLEES' BRIEF; BEGIN TO PROOFREAD SAME.

08/21/90 RNB 8.30 747.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING REVISIONS TO APPELLEES' BRIEF; BRIEF FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; CONTINUE TO PROOFREAD APPELLEES' BRIEF; SERVICE AND FILING OF SAME.

08/22/90 RNB 0.20 18.00
BRIEF TELEPHONE CONFERENCE WITH CLERK'S OFFICE TO CONFIRM RECEIPT OF APPELLEES' BRIEF FOR FILING.

08/29/90 RNB 1.30 117.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT BEFORE SECOND CIRCUIT; BEGIN PREPARATION FOR ORAL ARGUMENT.

08/30/90 RNB 1.70 153.00
PREPARE NOTEBOOK OF CASELAW AND LEGISLATIVE HISTORY FOR ORAL ARGUMENT.

08/31/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ORAL ARGUMENT; LETTER TO ATTORNEY PEARSON REGARDING NOTEBOOK OF RELEVANT

CASELAW AND LEGISLATIVE HISTORY FOR ORAL ARGUMENT.

09/05/90 RNB 1.50 135.00
REVIEW AND ANALYSIS OF APPELLANT'S REPLY BRIEF.

09/06/90 RNB 1.50 135.00
FURTHER REVIEW AND ANALYSIS OF APPELLANT'S REPLY BRIEF; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME IN FURTHER PREPARATION FOR ORAL ARGUMENT.

09/14/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ORAL ARGUMENT.

10/09/90 RNB 0.70 63.00
REVIEW NOTICE OF ORAL ARGUMENT; DRAFT ACKNOWLEDGEMENT OF SAME; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT.

10/11/90 RNB 2.30 207.00
REVIEW AND ANALYZE BRIEFS FILED ON APPEAL; PREPARE FOR ARGUMENT ON NOTICE ISSUE.

10/24/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR ORAL ARGUMENT.

10/25/90 RNB 2.80 252.00
REVIEW AN ANALYSIS OF BRIEFS; EXTENDED TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ARGUMENTS ON NOTICE ISSUE; FOLLOW-UP EXTENDED TELEPHONE CONFERENCE

WITH ATTORNEY PEARSON REGARDING ARGUMENTS ON OTHER ISSUES ON APPEAL.

10/26/90 RNB 2.50 225.00
FURTHER REVIEW AND ANALYSIS OF BRIEFS IN PREPARATION FOR ORAL ARGUMENT; FURTHER REVIEW AND ANALYSIS OF HALLSTROM CASE.

10/28/90 RNB 5.80 522.00
EXTENSIVE ANALYSIS OF NOTICE REQUIREMENTS OF CITIZEN SUIT PROVISIONS OF RCRA AND THE CWA, AND FURTHER REVIEW AND ANALYSIS OF BRIEFS ON APPEAL IN PREPARATION FOR ORAL ARGUMENT; CONFERENCE WITH ATTORNEY PEARSON REGARDING ANALYSIS OF ISSUES AND ARGUMENTS ON APPEAL.

10/29/90 RNB 10.50 945.00
FURTHER PREPARATION FOR AND ATTEND ORAL ARGUMENT; ATTEND CONFERENCE WITH STAFF COUNSEL STANLEY BASS AND ATTORNEYS PEARSON AND CLAPP.

11/05/90 RNB 2.80 252.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING ORAL ARGUMENT AND SETTLEMENT STRATEGY; TELEPHONE CONFERENCE WITH ATTORNEY CLAPP REGARDING CITY'S SETTLEMENT OFFER; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON AND ATTORNEY GALLAGHER REGARDING CITY'S SETTLEMENT OFFER; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON AND ATTORNEY CLAPP REGARDING REJECTION OF CITY'S SETTLEMENT OFFER; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY

PEARSON IN PREPARATION FOR CONFERENCE CALL TO STAFF COUNSEL STANLEY BASS; TELEPHONE CONFERENCE WITH STAFF COUNSEL BASS, AND ATTORNEYS PEARSON AND CLAPP REGARDING SETTLEMENT; FOLLOW-UP TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME; TELEPHONE CONFERENCE WITH ACCOUNTING DEPARTMENT REGARDING FEES AND COSTS INCURRED SINCE 31 OCTOBER 1989.

11/12/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING CITY'S DECISION NOT TO INCREASE SETTLEMENT OFFER.

11/13/90 RNB 0.30 27.00
TELEPHONE CONFERENCE WITH ATTORNEY MCKEARIN AND STAFF COUNSEL BASS' ASSISTANCE REGARDING CITY'S DECISION NOT TO INCREASE OFFER OF SETTLEMENT.

12/04/90 RNB 0.80 72.00
LEGAL RESEARCH UPDATE ON NOTICE REQUIREMENTS AND GOVERNMENTAL ACTION PREEMPTION UNDER CITIZEN SUIT PROVISION OF RCRA.

01/17/91 RNB 0.30 33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR SUPPLEMENTATION APPLICATION FOR FEES AND COSTS IN THE EVENT THE SECOND CIRCUIT COURT OF APPEALS AFFIRMS THE DECISIONS BELOW.

03/25/91 RNB 0.30 33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING APPEAL AND PLAN COURSE OF ACTION IN THE AFTERMATH OF DECISION.

04/08/91 RNB 0.30 33.00
TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING PREPARATION FOR APPLICATION FOR FEE AWARD AND DISPOSITION OF PENDANT STATE CLAIMS.

05/16/91 MJC 0.80 48.00
TELEPHONE CONFERENCE WITH DON BISSETTE REGARDING INQUIRY INTO STATUS OF CASE; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING SAME.

06/12/91 JCG 1.10 159.50
TELEPHONE CONFERENCE WITH ATTORNEYS PEARSON AND BLAND REGARDING TODAY'S DECISION FROM SECOND CIRCUIT AND REGARDING FUTURE EFFORTS, INCLUDING SUPPLEMENTAL FEE APPLICATION, RELATING THERETO; PREPARE AND FORWARD TO ATTORNEY PEARSON SUPPLEMENTAL DRAFT BILL.

06/13/91 JCG 0.50 72.50
REVIEW DECISION RECEIVED FROM SECOND CIRCUIT; RETRIEVE COPY OF PRIOR FEE APPLICATION AND SUPPORTING DOCUMENTATION.

06/14/91 JCG 0.40 58.00
TELEPHONE CONFERENCE WITH A ATTORNEY BRIGGS REGARDING ARRANGEMENTS FOR SUPPLEMENTAL FEE APPLICATION; REVIEW 23 U.S.C. § 1961.

06/14/91 HB 0.30 43.50
TELEPHONE CONFERENCE WITH ATTORNEY GALLAGHER REGARDING SUPPLEMENTAL FEE APPLICATIONS.

06/17/91 JCG 0.60 87.00
TELEPHONE CONFERENCE WITH ATTORNEY BRIGGS REGARDING SECOND CIRCUIT MANDATE AND INTEREST CLAIM; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING LOGISTICS OF FEE APPLICATION AND SUPPORTING MATERIAL.

06/17/91 KEW 7.20 252.00
SUPPORTING DOCUMENTATION FOR FEE APPLICATION REQUEST.

06/17/91 ART 7.20 648.00
DRAFT MEMORANDA IN SUPPORT OF BILL OF COSTS TO BE SUBMITTED IN DISTRICT COURT AND SECOND CIRCUIT; DRAFT ATTORNEY AFFIDAVITS IN SUPPORT OF FEE REQUEST TO SECOND CIRCUIT; TELEPHONE CONFERENCE WITH ATTORNEY PEARSON REGARDING FEE REQUEST; DRAFT NOTICE OF MOTION; WORK ON SUPPORTING DOCUMENTATION FOR EXPENSE REQUEST.

06/17/91 HB 6.00 870.00
LEGAL RESEARCH AND STARTING TO PREPARE APPLICATIONS FOR ATTORNEYS FEES AND BILLS OF COSTS.

06/18/91 HB 3.20 464.00
PREPARATION OF MEMORANDA IN SUPPORT OF FEE APPLICATIONS.

06/18/91 ART 6.90 621.00
CONTINUE WORK ON MOTIONS FOR ATTORNEY FEES AND BILLS OF COST TO BE

FILED WITH BOTH SECOND CIRCUIT AND DISTRICT COURT; DRAFT MOTION FOR ATTORNEY FEES IN DISTRICT COURT.

06/20/91 HB 4.00 580.00
CONTINUING PREPARATION OF FEE APPLICATIONS AND BILL OF COSTS TO SECOND CIRCUIT AND DISTRICT COURT.

06/20/91 MJC 3.10 186.00
PREPARATION OF EXPENSES FOR FEE APPLICATIONS.

06/21/91 HB 2.50 362.50
CONTINUING PREPARATION OF FEE APPLICATIONS.

06/21/91 MJC 4.00 240.00
FINALIZING EXPENSE INFORMATION.

06/24/91 HB 6.70 971.50
FINAL REVIEW AND EDITING OF FEE APPLICATIONS.

06/24/91 ART 7.30 657.00
FINAL REVIEW AND EDITING OF FEE APPLICATIONS

06/24/91 MJC 1.00 60.00
FINAL COLLATING AND FILING OF FEE APPLICATIONS.

James C. Gallagher					
2.60	HOURS AT	145.00	/HR	=	377.00
Heather Briggs					
22.70	HOURS AT	145.00	/HR	=	3,291.50
Richard N. Bland					
0.90	HOURS AT	110.00	/HR	=	99.00
Richard N. Bland					
256.80	HOURS AT	90.00	/HR	=	23,112.00

Anita R. Tuttle				
14.20 HOURS AT	90.00	/HR	=	1,278.00
Michael J. Case				
8.90 HOURS AT	60.00	/HR	=	534.00
Michael J. Case				
2.70 HOURS AT	55.00	/HR	=	148.50
Keith E. Wexelblatt				
7.20 HOURS AT	35.00	/HR	=	252.00
TOTAL SERVICES RENDERED				$29,092.00

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE	)	
Plaintiffs-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AWARD OF FEES AND COSTS

STATE OF ARIZONA)
) ss AFFIDAVIT
COUNTY OF PIMA)

William W. Pearson, being duly sworn, deposes and states as follows:

1. From the beginning of this action until May 30, 1989, I was a partner in the law firm of Downs, Rachlin & Martin, attorneys for plaintiffs in this action. Since June 1, 1989, I have been with the firm of Molloy, Jones & Donahue in Tucson, Arizona. This affidavit provides additional support for plaintiffs' application for the award of fees and costs on appeal pursuant to this Court's Order of June 12, 1991, and 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d).

2. My relevant background is as follows:

a. B.A. degree from University of Chicago in 1968

b. J.D. degree from Georgetown University Law Center in 1971

c. Admitted to Indiana Bar and U.S. District Court, Southern District of Indiana in 1971

d. Admitted to Vermont Bar in 1975 and the U.S. District Court, District of Vermont in 1977

e. Admitted to U.S. Court of Appeals, 2nd Circuit in 1986

f. Admitted to Arizona Bar and U.S. District Court, District of Arizona in 1989.

3. I am an experienced trial attorney in the field of environmental law. I have handled a variety of environmental legal problems including hazardous and solid waste management, toxic torts, NPDES permits, landfills, lender liability for environmental hazards, environmental audits, wastewater treatment facilities, Superfund, RCRA, Act 250, underground storage tanks, and insurance coverage for environmental claims.

4. In practicing environmental law in Vermont, it is my experience that a very high percentage of fee paying clients retain big city, national law firms to do their high stakes, sophisticated environmental work. For example, Downs, Rachlin & Martin is one of only a couple Vermont law firms who are lead counsel for a significant party in Vermont's Superfund sites. The other significant parties are represented by law firms from such places as Boston, New York City, and Washington, D.C. These outside Vermont firms are hired because the laws are complex, the technical issues sophisticated and the financial stakes are high. Commensurate with their experience and expertise, these out-of-state firms charge hourly fees substantially higher than their Vermont counterparts.

5. Presently, I am responsible for the environmental practice in Molloy, Jones & Donahue, which is one of the premier law firms in Tucson, Arizona, a city whose population is greater than all of Vermont. I am continuing my environmental law practice in the areas outlined above. My present hourly rate is $170.00 per hour.

6. Attached to this Affidavit is an account of legal services provided by me in this action from May 7, 1990 to present. During this time, I kept contemporaneous

records of the date and time spent working on this case. I also made contemporaneous description entries for the work done.

7. I have reviewed the attachments to Exhibits 1 and 2. To the best of my knowledge, Exhibits 1 and 2 are fair and accurate itemizations of the legal services and costs related to this action for the time period stated herein, including necessary travel costs to New York to argue this appeal.

8. Concerning the plaintiffs' application for an enhancement of the fees as stated, it is my considered judgment that the plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself based on the following:

a. The plaintiffs had no funds with which to pay for legal services on an up-front basis;

b. At the time this suit was brought Attorney Bland and I were among a handful of Vermont lawyers sufficiently sophisticated in this specialized area to handle plaintiffs' claims;

c. Defendant is a political subdivision which does not function or have priorities like a private sector party thereby increasing the uncertainty of a strategy and outcome;

d. The enormous up-front expense in this case of services and costs incurred would be prohibitive to all but larger law firms.

9. In summary, in my professional judgment, the total lodestar and enhancement requested are reasonable

and appropriate given all the factors listed in the Application itself and in this affidavit.

/s/ William W. Pearson
William W. Pearson

SUBSCRIBED AND SWORN TO before me this 21 day of June, 1991, by William W. Pearson.

/s/ Steffney R. Thompson
Notary Public

My Commission Expires:

My Commission Expires November 11, 1994

BILLING STATEMENT OF
WILLIAM W. PEARSON, ESQ.
TUCSON, ARIZONA

June 25, 1991

Mr. Ernie Dague, Sr.
Estate of Ernie Dague, Jr.
Mrs. Betty Dague
Ms. Rose Bessette
Manhatten Drive
Burlington, Vermont 05401

File Number: 2369-0001

For Period: May 8, 1990 to June 25, 1991

Matter: Dague v. City of Burlington
Second Circuit Appeal

Sample Entry –

Date:	Hours:	Amount:
Description of Services:		
5/08/90	2.2	374.00
Read and analyze Judge Billing's order granting city's Rule 54(b) request; check rule for format; phone conference with attorney Bland		
5/09/90	1.7	289.00
Outline strategy for pre-appeal preparation by selecting issues updated research needed		
6/06/90	1.0	170.00
Read city's notice of appeal; lengthy phone conference with attorney Bland; analyze what issues might be raised in cross-appeal		
6/08/90	4.8	816.00
Review Second Circuit appeal procedures; further analysis of cross-appeal issues; do overview of memoranda filed to date and identify issues needing further research and update; lengthy phone conference with attorney Bland		
6/11/90	1.0	170.00
Very lengthy phone conference with attorney Bland on appeal procedures, cross appeal, city's appeal issues and possible waiver of notice claim		
6/18/90	2.7	459.00
Read and analyze city's form C and pre-argument statement; compare issues to those already fully addressed in prior memoranda; lengthy phone conference with attorney Bland		
6/19/90	0.3	51.00
Phone conference with attorney Bland on appeal		

6/21/90 0.5 85.00
Phone conference with attorney Bland on Sierra Club as *amicus curiae*

6/25/90 1.3 221.00
Review court scheduling order; develop checklist of essential documents to be included in record on appeal

6/26/90 0.8 136.00
Review city's letter to 2nd Circuit court clerk analyze options with attorney Bland on scheduling and appeal work allocation

6/29/90 0.3 51.00
Phone conference with attorney Bland on hearing postponement

7/02/90 0.2 34.00
Read 2nd Circuit's rescheduling order

7/03/90 0.5 85.00
Lengthy phone conference with attorney Bland about rescheduling order and strategy at pre-argument conference

7/08/90 6.3 1071.00
Prepare for pre-argument conference by reviewing all court orders, motions and memos related to appeal issues

7/09/90 0.3 51.00
Phone conference with attorney Bland on positions to take in pre-argument conference

7/10/90 4.8 816.00
Finalize preparation for pre-argument conference; several extended phone conferences with attorney Bland on pre-argument conference; pre-argument conference held with city and Staff Attorney Bass

7/13/90 0.5 85.00
Extended phone conference with attorney Bland on research status and record on appeal status

7/16/90 0.8 136.00
Review city document designation; review notice of appearance requirements

7/19/90 6.3 1071.00
Begin outline of appeal issues and arguments in 2nd Circuit; review case copies available and locate additional copies needed; analyze city's possible claims about dismissed third parties; review Rule 54(b) problem at appeal; check for additional case law after *Hallstrom;* outline issues to discuss with attorney Bland and the city

7/20/90 0.8 136.00
Phone conference with attorney Bland; send package to attorney Bland with notice of appearance

7/27/90 0.3 51.00
Status review on city's brief

7/30/90 5.0 850.00
Read and analyze city's brief; list issues to be responded to; lists errors in statement of facts, case and issues

8/03/90 3.8 646.00
List significant facts to be included in plaintiffs' statement of facts; research cases cited by city on railroad culvert as point source and standard of proof necessary for finding of substantial and imminent and endangerment; lengthy phone conference with attorney Bland on brief progress and its several subparts as well as overall strategy

8/04/90 4.5 765.00
Further research on issues begun yesterday; in particular whether state authorized program pre-empts or precludes citizens' suit action; further analysis of notice question both as to substance on regualtion [sic] compliance and subject matter jurisdiction

8/17/90 5.8 986.00
Read and analyze appellee's draft brief; several phone conferences with attorney Bland

8/18/90 7.8 1326.00
Detailed reading and editing of appellee's brief focusing on argument I (notice) and II (culvert is a point source).

8/19/90 5.4 918.00
Detailed reading and editing of appellee's brief focusing on argument III (imminent and substantial) and argument IV (attorney's fees); reread city brief for comparison and further edits

8/20/90 2.5 425.00
Review draft brief further; phone conference to attorney Bland

8/21/90 1.8 306.00
Further analysis of brief with final edits; several phone conferences with attorney Bland

8/29/90 1.8 306.00
Phone conference with attorney Bland on oral argument at 2nd Circuit; initial outline of presentation

8/31/90 0.3 51.00
Phone conference with attorney Bland on oral argument casebook, record on appeal and legislative history

9/05/90 2.5 425.00
Read and analyze city's reply brief; compare first brief for any changes in strategy

9/06/90 1.0 170.00
Further review of city's reply brief; phone conference with attorney Bland on city's brief

9/14/90 0.3 51.00
Phone conference with attorney Bland on oral argument

10/09/90 0.6 102.00
Review notice of oral argument; phone conference with attorney Bland about argument strategy

10/10/10 [sic] 0.3 51.00
Make travel arrangements for argument in New York

10/12/90 2.0 340.00
Begin detailed preparation for oral argument; Outline argument relative to notice; phone conference with attorney Bland

10/16/90 1.5 255.00
Outline argument relative to culvert as point source

10/22/90 4.0 680.00
Read city's briefs and compare to plaintiff's briefs on all significant points;

10/24/90 2.2 374.00
Review notice issues, point source issues and Rule 54(b) issue; phone conference with attorney Bland;

10/25/90 6.4 1088.00
Draft final outline of argument; draft individual cards for each appeal issue; begin final review of

sigificant [sic] cases on each point; phone conference with attorney Bland

10/26/90 8.0 1360.00
Travel to New York for argument

10/28/90 6.2 1054.00
Final review prior to argument on all issues; read remaining cases, in particular *Halstrom, Ottati* and *Earth Sciences;* review of these issues with attorney Bland

10/29/90 12.8 2176.00
Final preparation for argument; oral argument before Second Circuit; meeting with Staff Counsel Bass and city; return to Arizona

11/05/90 2.0 340.00
Numerous phone calls with and between Staff Counsel Bass, city, attorney Bland and attorney Gallagher about settlement

11/12/90 0.3 51.00
Phone conference with attorney Bland about city's no movement settlement posture

1/17/91 0.3 51.00
Phone conference with attorney Bland on status of appeal decision and additional application for fees if the appeal is successful

3/25/91 0.3 51.00
Status phone conference with attorney Bland

4/08/91 0.3 51.00
Status phone conference with attorney Bland

6/12/91 1.0 170.00
Phone conference with attorney Bland on Second Circuit decision; phone conference with clients about decision;

6/17/91 2.5 425.00
Read Second Circuit decision in detail; phone conference with Court on entry of judgment; phone conference with attorney Bland; phone conference with attorney Clapp for city

6/18/91 1.5 255.00
Review supplemental petition for fee requirements; collect data for entry into supplemental petition.

6/19/91 5.8 986.00
Draft and edit supplemental petition for fees and costs from October 31, 1989 to June 25, 1991

William W. Pearson
141.9 hours at $170.00/hour = $ 24,223.00

Total Services Rendered $24,223.00

DISBURSEMENTS

DESCRIPTION	AMOUNT
Travel	444.00
Travel	725.00
Total 1169.00	

FINAL SUMMARY

DESCRIPTION	AMOUNT
CURRENT FEES	$ 24,223.00
CURRENT DISBURSEMENTS	1169.00
CURRENT INVOICE TOTAL	$ 25,292.00

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiff-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT OF ROBERT A. MELLO

Robert A. Mello, being duly sworn, deposes and states the following:

1.

I am an attorney in South Burlington, Vermont. I graduated from St. John's Seminary in 1968 and Boston College (J.D., 1971), and I have been in practice in the Burlington area since 1975.

2.

Having practiced law in Burlington, Vermont for approximately 19 years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

My customary billing rate for fee-paying clients is $105-135 per hour.

4.

I am professionally and personally acquainted with William Pearson and Richard N. Bland, formerly with the law firm of Downs Rachlin & Martin, and I believe them to possess a high degree of knowledge and expertise in the field of environmental law.

5.

I understand that the current billing rate charged by Mr. Pearson is $170 per hour, and that charged by Mr. Bland is $100 per hour. I further understand that the billing rates for attorneys in the firm of Downs Rachlin & Martin range from $60-$175 per hour, depending upon the level of experience. I also understand that the billing rates for legal assistants in the firm of Downs Rachlin & Martin range from $50-$65 per hour, depending upon the level of experience.

Based upon my own hourly rate, and my general knowledge of the hourly rates charged by other attorneys and legal assistants in the Burlington area, I believe that the hourly rates charged by the law firm of Downs Rachlin & Martin are within the range of hourly rates charged by other law firms in the Burlington area.

6.

I engage in the general practice of law. When I take on plaintiffs' work on a contingency basis, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally would return more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Robert A. Mello
Robert A. Mello

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 21st day of June, 1991.

/s/ Joanne Aja Simpson
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiff-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT OF JON R. EGGLESTON

Jon R. Eggleston, being duly sworn, deposes and states the following:

1.

I am a duly licensed attorney admitted to practice in Vermont. I received my B.A. from the University of Denver in 1968, my J.D. from Cornell University in 1971 and an LL.M. in Taxation in 1975 from the Georgetown University Law Center. I am admitted to practice before the U.S. District Court for the District of Vermont.

2.

I am a partner in the firm of Miller, Eggleston & Rosenberg in Burlington, Vermont and am engaged in general corporate law and taxation.

3.

Having practiced law in Vermont since 1971, I am familiar with hourly rates charged by law firms and attorneys in the Burlington area.

4.

I personally charge clients at the rate of $175 per hour.

5.

Based upon my own hourly rate, and my knowledge of the fees customarily charged by attorneys in this community, I believe that the current hourly rates charged by William W. Pearson and Richard N. Bland, $170 per hour and $100 per hour, are reasonable hourly rates for the Burlington legal market.

6.

My firm seldom represents plaintiffs on a contingency fee basis. This is because a contingent fee which will be equal only to our usual hourly rates offers no incentive for taking on such work. Indeed, it is my belief, based on my knowledge and experience of the Burlington legal community, that lawyers who take such contingency cases expect to recover a multiple of their usual hourly rate if they were to avail in the case. Without this expectation, there is no incentive for taking a contingency case.

/s/ Jon R. Eggleston
Jon R. Eggleston

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 24th day of June, 1991.

/s/ Kimberly A. Coon
Notary Public
Commission Expires 2-10-95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, and ROSE A. BESSETTE,	)	
Plaintiff-Appellees,	)	Docket No. 90-7544
v.	)	
CITY OF BURLINGTON,	)	
Defendant-Appellant	)	

AFFIDAVIT OF MICHAEL G. FURLONG

Michael G. Furlong, being duly sworn, deposes and states the following:

1.

I am a partner in the law firm of Sheehey Brue Gray & Furlong in Burlington, Vermont. I graduated from Middlebury College (B.A., 1973) and Cornell University (J.D., 1978), and I have been in practice in Burlington since 1978.

2.

Having practiced law in Burlington, Vermont for approximately thirteen years, I am generally familiar with the hourly rates charged by other law firms and attorneys in this area.

3.

The customary billing rates for the attorneys in our firm range from $95 to $120 per hour. My customary billing rate in $120 per hour.

I understand that the current billing rate charged by William W. Pearson is $175 per hour.

I understand that the current billing rate charged by Richard N. Bland is $100 per hour, and that the billing rates for other attorneys in the firm of Downs Rachin[sic] & Martin range from $60 to $175 per hour, depending upon the level of experience.

Based upon my own firm's billing practices and hourly rates, and my general knowledge of the fees customarily charged by other attorneys in Burlington, Vermont, I believe that the hourly rates charged by Mr. Pearson and the hourly rates charged by attorneys in the firm of Downs Rachlin & Martin are within the range of hourly rates charged by attorneys in the Burlington area.

5.

Our firm engages in the general practice of law, with a majority of our work involving business and commercial matters.

Our firm does not do extensive plaintiffs' work on a contingency fee basis. When we do so, the fees charged are usually determined as a percentage of the recovery, and that percentage is fixed at a level which normally

would return to the firm more than would be charged on an hourly basis, in order to reflect the risk of no recovery.

/s/ Michael G. Furlong
Michael G. Furlong

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

Sworn to and subscribed before me this 20th day of June, 1991.

/s/ Denise M. Longchamp
Notary Public
Commission Expires 2-10-95

Supreme Court, U.S.
FILED
MAR 12 1992
OFFICE OF THE CLERK

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

MICHAEL B. CLAPP*
ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont 05402-0988
Telephone: (802-864-5751)
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

May a court, in determining a reasonable attorney's fee award under Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. Section 6972(e), or Section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

LIST OF PARTIES AND CORPORATIONS

CITY OF BURLINGTON,
a municipal corporation with no affiliation to any parent or subsidiary or related corporation,
Petitioner

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE
Respondents

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	9
ARGUMENT	11
1. The Statutes And Relevant Legislative History Do Not Authorize, A Separate Award Of Attorney's Fees To Reflect A Contingency Risk Of Loss	11
2. The Jurisprudence Of This Court Relating To Attorney's Fee Awards Militates Against Risk Of Loss Enhancement Of The Lodestar Fee	14
3. A Contingency Risk Of Loss Factor Is Subsumed In The Determination Of A Reasonable Hourly Rate And May Not Serve As A Basis For Enhancing The Lodestar Award	17
4. Contingency Risk Of Loss Enhancements Of The Lodestar Amount Cannot Be Justified	18
5. The Failure Of The District Court And The Court Of Appeals To Comply With Requirements Set Forth In *Hensley v. Eckerhart* With Respect To The Award Of Attorney's Fees Was Erroneous And Constitutes An Abuse Of Discretion	21
6. The Results Obtained In This Case Are Not Exceptional And Do Not Justify An Increased Fee. The Results Obtained Are, In Fact, So Limited As To Require A Reduction Of The Lodestar Amount	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Blanchard v. Bergeron, 489 U.S. 87 (1989) 12, 17, 20

Blum v. Stenson, 465 U.S. 886 (1984) 16, 18, 20, 23

Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974) 13

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) ..... *passim*

Lewis v. Coughlin, 801 F.2d 570 (2d Cir. 1986) 21, 23

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 26

Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, 478 U.S. 546 (1986) 16, 17, 18

Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, 483 U.S. 711 (1987) 18

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974) 13

Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) 13

STATUTES

28 U.S.C. § 1254(1) 2

33 U.S.C. § 1365(d) 3, 9

42 U.S.C. § 1988 11

42 U.S.C. § 6972(e) 3, 9

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

SENATE REPORT NO. 94-1011 (1976) 11, 13

HOUSE REPORT NO. 94-1558 (1976) 11

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW[1]

The opinion of the court of appeals (App. 1-37) is reported at 935 F.2d 1343. The opinion of the district court dated October 16, 1989 (App. 59-115) is reported at 732 F. Supp. 458. The opinion of the district court dated March

[1] Citations to the Joint Appendix filed with this brief are designated as "Jt. App. ___". Citations to the Appendix attached to the Petition for a Writ of Certiorari are designated as "App. ___".

15, 1990 (App. 118-129) is reported at 733 F. Supp. 23. The balance of the court of appeals and district court opinions and orders are not reported: Opinion and Order of United States District Court for the District of Vermont, March 26, 1986 (App. 44-53); Opinion and Order of Second Circuit Court of Appeals, August 20, 1986 (App. 142-144); Opinion and Order of the United States District Court for the District of Vermont, April 2, 1990 (App. 130-134); Order of the United States District Court for the District of Vermont, May 4, 1990 (Jt. App. 296-301); Judgment of United States District Court for the District of Vermont, May 7, 1990 (App. 116-117); Order of Second Circuit Court of Appeals, August 20, 1991 (App. 145-146); Order of United States District Court for the District of Vermont, October 11, 1991 (App. 137-138); and Order of Second Circuit Court of Appeals, October 25, 1991 (App. 38-39).

JURISDICTION

The opinion of the court of appeals was entered on June 12, 1991. A timely motion for reargument was denied on August 20, 1991. (App. 145). A petition for a writ of certiorari was timely filed on November 18, 1991. The petition was granted on January 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutes are set out verbatim in the Appendix:

Section 505 of Clean Water Act (33 U.S.C. § 1365). (App. 183).

Section 7002 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6972). (App. 232).

STATEMENT OF CASE

Respondents own property adjacent to the City of Burlington municipal landfill. At the time Respondents filed their complaint, the City was operating its landfill pursuant to authority granted by the State of Vermont and subject to a state court order requiring the City to install a leachate collection system designed to prevent the migration of 90% of the leachate produced at the landfill, and a methane control system designed to prevent the migration of methane gas in explosive limits beyond the landfill boundary. In addition, the state court order required that the landfill cease waste acceptance and close on or before January 1, 1990.

Respondents' multi-count complaint included citizen suit actions brought pursuant to the Clean Water Act and the Resource Conservation and Recovery Act alleging violation of those Acts and seeking injunctive relief. The complaint also sought injunctive relief and damages in connection with various state law claims. The injunctive relief sought by Respondents included *inter alia*: (1) the

issuance of preliminary and permanent injunctions mandating immediate closure of the landfill, and cessation of unlawful discharges of hazardous and toxic pollutants; (2) an order requiring Petitioner to present to the court within 30 days a plan to excavate and properly dispose of hazardous wastes in the landfill and continued court supervision of the implementation of any court-ordered remedial action; (3) an order prohibiting any alteration of the landfill without the approval of a court-appointed monitor to be paid for by Petitioner; (4) an order requiring the City to present to the court within 30 days a plan to purge hazardous and toxic materials from groundwater and surface water beneath and adjacent to the landfill and to implement any approved plan under the supervision of the court; (5) an order requiring the City to install and operate a leachate collection drain system; (6) an order requiring presentation to the court within 30 days of a methane gas control and abatement plan, and installation of any such approved system under the court's supervision; (7) an order requiring the City to report monthly to the court-appointed monitor; (8) an order requiring the City to post a bond or other equivalent security; (9) imposition of civil penalties; and (10) an award of attorney's and expert witness fees (see Complaint, App. 244, 267-69).

Shortly after the complaint was filed, hearings on the motion for a preliminary injunction were commenced before the United States Magistrate. Subsequently, the court issued an order on March 26, 1986, denying the Respondents' motion for a preliminary injunction. (App. 40-53).

Respondents unsuccessfully appealed the denial of their motion for a preliminary injunction to the Second Circuit Court of Appeals. (App. 142-144).

Thereafter, the trial court severed Respondents' actions seeking injunctive relief, including the claim based upon state law, for a bench trial. The district court heard the motion for a permanent injunction during May of 1989 and issued its opinion on October 16, 1989. (App. 115). The opinion includes findings that the City was in violation of certain provisions of the Clean Water Act and the Resource Conservation and Recovery Act and Vermont's Groundwater Protection Act. The court also found that a closure date of January 1, 1990 was established under an existing state court order (App. 63-64); that the state considered the January 1, 1990 closing date appropriate (App. 65); and that the state intended to enforce the state court order requiring closure on that date. (App. 65). The district court then issued an order requiring that the landfill be closed on January 1, 1990, the same date fixed by the state court order. Otherwise, the court did not grant Respondents any of the injunctive relief which they sought. Nevertheless, the same opinion concluded that the Respondents had "substantially prevailed in both their RCRA and CWA claims" and ordered the City to pay costs of litigation, "including reasonable attorney and expert witness fees to be assessed." (App. 88-89).

Respondents then filed an application for attorney fees seeking a lodestar fee of $198,027.50 based upon 3185.4 hours of attorney and paralegal time at various

hourly rates ranging from $30 to $125 per hour, (Jt.App. 10) which Respondents represented were "reasonable". (Jt.App. 5-6) Respondents also sought a 100% enhancement of the lodestar. (See Memorandum of Respondents (Jt.App. 1-11, 14)).

Petitioner opposed the award of attorney fees on the grounds that Respondents had not substantially prevailed in light of the fact that the judgment issued by the court did nothing more than approve a closing date for the landfill which had been established prior to initiation of the action, and did not otherwise grant Respondents any of the relief sought by their litigation. (See Memorandum of Petitioner, (Jt.App. 219-226)).

Petitioner did not contest that the hourly rates proposed by the Respondents were reasonable. Rather, the City contended that the Respondents' lack of success in the litigation required that all time associated with those claims for relief on which the Respondents did not succeed be eliminated from the lodestar calculation and that the properly computed lodestar be reduced to reflect the Respondents' very limited success to the extent they could be said to have prevailed. (See Memorandum of Petitioner (Jt.App. 219-226)).

The district court thereafter issued its opinion of April 2, 1990 in which it found that the hourly rates proposed by Respondents were reasonable. It also found that the number of hours expended were "reasonable in connection with this complex action" and awarded a lodestar fee of $198,027.50 as requested by Respondents (App. 130-134).

Without commenting upon the results obtained or discussing how it had considered the relationship between the amount of the lodestar fee and the results obtained by Respondents in the litigation, the district court awarded Respondents a 25% risk/contingency enhancement ($49,506.87) based on conclusions that: (1) "Plaintiffs' attorneys would not have been compensated at all unless plaintiffs prevailed"; (2) the risk of not prevailing was substantial; (3) plaintiffs did not ultimately prevail until after trial; and (4) without the opportunity for enhancement, plaintiffs would have faced substantial difficulty obtaining counsel of reasonable skill and competence in this complicated field of law. (App. 130-174).

On May 7, 1990 the court entered judgment with respect to the federal law actions. (App. 116-117). The judgment required the closure of the landfill on or before January 1, 1990. It specifically denied the imposition of civil penalties and was silent with respect to all other relief requested by the complaint, except that it ordered payment of the lodestar fee, expenses, and the enhancement award set forth in its opinion of April 2, 1991.

The judgment of the trial court was appealed on several grounds, including the award of attorney fees in the lodestar amount and the award of enhancement. The Second Circuit affirmed the trial court's judgment in all respects. (App. 1-37). In particular, it determined that no reduction in the lodestar was appropriate because the case was complex. (App. 33). The appellate court did not attempt to relate the amount of the lodestar to the degree of success obtained, saying only that the district court

"did not err by rejecting the city's efforts to trivialize the plaintiffs' success." (App. 34).

The Second Circuit also upheld the 25% enhancement, holding that enhancement of the lodestar was appropriate if "without the possibility of fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the court." (App. 34-37).

On June 25, 1991 Respondents filed a supplemental application for an award of attorney fees with the district court covering work performed after the date covered by its initial application. Respondents' sought a lodestar fee of $24,113, a 25% enhancement of $6,028.25, and expenses of $2,707.61. (Jt.App. 311-312). That application was granted by the district court on October 11, 1991. (App. 137-138).

Finally, Respondents filed an application with the court of appeals for work connected with the appeal to that court, seeking a lodestar fee of $53,315.00, an enhancement of $13,328.75 and expenses of $2,240.34. (Jt.App. 362-363). On October 25, 1991 the Second Circuit granted the motion to the extent of the requested lodestar and expenses, but denied the request for "risk enhancement" holding that the "risk" involved in defending on appeal is "not significant" and "in the circumstances of this case calls for no enhancement to the lodestar amount." (App. 38-39).

SUMMARY OF ARGUMENT

The attorney fee provisions of the Clean Water Act, 32 U.S.C. § 1365(d) and the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), as well as the legislative history of federal fee shifting statutes in general, allow the award of *reasonable* attorney's fees to prevailing plaintiffs. The intent of the statutes is to provide for an award in an amount no more than is sufficient to attract competent counsel. Nothing in the statutes or the legislative history authorizes a separate award of attorney's fees in addition to a properly computed lodestar fee to compensate plaintiffs' counsel for taking the case on a contingent fee basis.

Jurisprudence developed by this Court respecting the award of statutory attorney's fees, including the adoption of a particular lodestar method of determining reasonable fee awards, militates against an enhancement of the lodestar fee to reflect a contingency risk of loss. The lodestar method of fee determination requires the district court to follow a two-step process in determining a reasonable fee. The first step requires the trial court objectively to determine a reasonable hourly rate, based upon evidence of market rates presented to it, sufficient to attract competent counsel to perform the work involved. The determination of a reasonable hourly rate subsumes any contingency risk of loss factor which might affect the market rate. The court must also determine from evidence presented the number of hours reasonably expended on the case. The lodestar fee – the product of all hours reasonably expended multiplied by the reasonable hourly rate – represents the maximum reasonable fee in all cases where essentially complete relief is obtained; but such an award is excessive where the relief obtained

is limited in relation to the relief requested and scope of the litigation as a whole. Step two of the lodestar method, therefore, requires that the lodestar fee be reduced where limited relief is obtained. Step two may not be avoided and is essential to assure that an award of fees is reasonable under the circumstances of the case.

The principles underlying the lodestar method will not logically admit of an enhancement for risk of loss contingency since any enhancement would, by definition, constitute a windfall to plaintiffs' counsel.

Use of a risk of loss contingency enhancement is inconsistent with the primary objective of the lodestar method, which was formulated by this Court to consider all relevant factors in awarding fees, while at the same time avoiding arbitrary and inconsistent results. It also demeans the judicial process and the integrity of the courts, since its application requires that the trial court make inconsistent findings.

Even if enhancement of the lodestar amount to reflect risk of loss contingency were compatible with logic and the lodestar method of fee determination, it should be rejected as a matter of policy because any such enhancement is necessarily arbitrary, results in a defendant paying plaintiffs' counsel for losing efforts, and involves the courts in policy assessments which are properly a question for Congress to resolve.

Finally, the results of this litigation, far from justifying an enhancement of the lodestar amount, in fact,

demand its reduction. The relief obtained by Respondents was so limited in comparison to the relief requested and the scope of the litigation that both the trial court and the Second Circuit Court of Appeals erred in not reducing the lodestar amount to reflect Respondents' limited success.

ARGUMENT

1. The Statutes And Relevant Legislative History Do Not Authorize A Separate Award Of Attorney's Fees To Reflect A Contingency Risk Of Loss.

Each of the statutes under which attorney's fees were awarded in this case provides that the district court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." The statutes provide only that any award of fees must be reasonable. Otherwise, they provide no guidance with respect to what amount of attorney's fees may be awarded in a particular case.

Although the legislative history of these statutes offers no guidance with respect to the issue of what amount constitutes a reasonable fee or what factors the courts should consider in determining a reasonable fee, recourse is often taken to the legislative history of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. That history is contained primarily in the House and Senate Reports which accompany the Act, H.R. Rep. No. 94-1558 (1976) and S. Rep. No. 94-1011 (1976). Both reports cite *Johnson v. Georgia Highway Express, Inc.*, 488

F.2d 714 (5th Cir. 1974), a case which sets out twelve factors[2] governing the amount of attorney's fee awards.

Of the criteria identified, only one – "whether the fee is fixed or contingent" – refers to contingency. But when the text of the *Johnson* opinion relating to that factor is read, it is apparent that the reference to the fee being contingent has nothing to do with the risk that a statutory fee will not be awarded. Instead, that section of the opinion makes clear that what was intended was a reference to the existence of any fee agreement with the client, be it fixed or contingent. The *Johnson* court reasoned that any such agreement would fix a ceiling for any statutory fee award. *Id.* at 718.[3]

The *Johnson* case itself, therefore, does not stand for nor even suggest the proposition that a contingency risk of nonpayment should be the subject of a separate award. Nor does the decision state that a court should consider

---

[2] The twelve *Johnson* factors are: 1. the time and labor required; 2. the novelty and difficulty of the questions; 3. the skill requisite to perform the legal service properly; 4. the preclusion of other employment by the attorney due to acceptance of the case; 5. the customary fee; 6. whether the fee is fixed or contingent; 7. time limitations imposed by the client or the circumstances; 8. the amount involved and the results obtained; 9. the experience, reputation, and ability of the attorneys; 10. the undesirability of the case; 11. the nature and length of the professional relationship with the client; and 12. awards in similar cases.

[3] This position has since been rejected by this Court in *Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989) (the *Johnson* contingency fee factor is just a factor and is not dispositive.)

the contingency risk that no statutory award will be made in determining a statutory award of fees.

The Senate Report, but not the House Report, also cites three cases which it concluded "correctly applied" the *Johnson* factors so that the resulting fee awards were "adequate to attract competent counsel," but were not "windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976).

One of the cases cited, *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) awarded an enhancement for contingency, quality of the attorney's work, and results obtained, but the "lodestar" amount in that case was computed using an "average" hourly rate, as contrasted with a "reasonable" or "market" hourly rate.

The second case cited in the Senate Report as correctly applying the *Johnson* standards is *Davis v. County of Los Angeles*, 8 E.P.D. ¶9444 (C.D. Cal. 1974). That case awarded an enhancement to a lodestar, apparently also calculated with reference to "normal hourly rates," but the enhancement was premised upon "the excellent results obtained" and the fact that the case was "difficult to litigate." The *Davis* opinion did not reference a contingency risk of loss factor.

In the third cited case, *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), the court, despite the excellent results obtained by the litigation, reduced a fee request of $204,237.50 which the court specifically found was reasonable, to a lower amount of $175,000 also determined by the court to be reasonable. The opinion refers to the *Johnson* factor of whether there was a fee contract, notes that there was no evidence of a fixed fee agreement, but holds that under the statute

reasonable fees should be determined by the court and awarded without reference to any fee agreement.

Given the divergence of the rationale and results reflected in the three cases cited by the Senate Report, no conclusion may be reached as to what the Senate intended by its reference to those cases. Furthermore, since the House Report does not refer to any of those cases it is questionable whether any significance can be placed on their citation by the Senate Report.

What is clear from the legislative history is that Congress considered a reasonable fee to be one sufficient to attract competent counsel, but no more; that the courts are directed to employ the factors set forth in *Johnson, supra,* in making reasonable fee awards; that attorney's fees should reflect time *reasonably* expended on a matter; and that fee awards should not be reduced simply because the relief sought is non-pecuniary in nature. Nothing in the statutes or the legislative history, however, instructs the courts how to apply the *Johnson* factors so as to convert them to dollars in a reasonable fee award.

2. The Jurisprudence Of This Court Relating To Attorney's Fee Awards Militates Against Risk Of Loss Enhancement Of The Lodestar Fee.

It was in light of the fact that neither the fee statutes nor the *Johnson* approach provide any framework in which to apply the various factors that this Court adopted the lodestar approach set out in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The *Hensley* lodestar method envisions a two-step process. In the first step, a

"lodestar" fee – defined as the product of all hours reasonably expended on the litigation, multiplied by a reasonable hourly rate – is determined. In the second step, the trial court is required to determine whether the lodestar fee should be adjusted upward or downward so as to properly reflect "reasonableness." The *Hensley* opinion establishes that the step two adjustment must reflect the *Johnson* "result obtained" factor, *Hensley, supra* at 434, and might reflect other *Johnson* factors to the extent they are not subsumed within the basic lodestar calculation. *Hensley, supra* at 434, n.9. The Court was unanimous with respect to the importance of the trial court's consideration of the results obtained factor. The majority opinion observed that the "important factor of the results obtained" is "particularly crucial where a plaintiff is deemed prevailing even though he succeeded on only some of his claims for relief," *Hensley, supra* at 434; that the "result is what matters," *id.* at 435; that "the most critical factor is the degree of success obtained," *id.* at 436; and that "the extent of plaintiffs' success is a crucial factor in determining the proper amount of an award of attorney's fees," *id.* at 440. The concurring portion of the opinion of Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, agreed with the Court's holding that "the extent of the plaintiffs' success is a crucial factor in determining the amount of a fee award," *id.* at 441, and went on to observe that:

> Any system for awarding attorney's fees that did not take account of the relationship between results and fees would fail to accomplish Congress' goal of checking insubstantial litigation.

Id. at 448.

Noting that the fact that a plaintiff achieved "prevailing party" status "may say little about whether the expenditures of counsel's time was reasonable in relation to the success achieved," *id.* at 436, the *Hensley* opinion required that "when an adjustment to the lodestar is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Id.* at 437. The opinion then held that a reduction from the lodestar fee "is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole" and "where the plaintiff achieved only limited success the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

The lodestar concept adopted in *Hensley* was prompted by the Court's perception that the *Johnson* approach, because it provided no framework for application of the fee-shifting factors and placed unlimited discretion in trial judges, led to arbitrary and disparate results. *Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air*, 478 U.S. 546, 562-64 (1986) (*"Delaware Valley I"*). In its decisions since *Hensley*, this Court has increasingly emphasized that the basic lodestar fee usually defines the upper limit of a reasonable fee award.

Blum v. Stenson, 465 U.S. 886 (1984) thus observed that the lodestar fee is presumptively the "reasonable fee," *id.* at 897 and held that "novelty" and "complexity of the issues," the "special skill and experience of counsel," and "quality of representation" and the "results obtained" from the litigation were all subsumed in the

lodestar calculation and could not serve as a basis for increasing the lodestar amount. *Id.* at 898-900.

In *Delaware Valley I*, this Court, observing that fee shifting statutes were not designed "to provide economic relief" to attorneys or "to replicate exactly the fee an attorney could earn through a private fee arrangement," characterized the lodestar figure as being strongly presumptive of a reasonable fee, which could be adjusted upward only in rare and exceptional cases. *Id.* at 565.

Finally, in *Blanchard v. Bergeron*, 489 U.S. 87 (1989) the Court indicated that lodestar fee awards, "properly calculated, *by definition* will represent the reasonable worth of services" and protect against windfall awards. *Id.* at 96. (Emphasis added).

3. A Contingency Risk Of Loss Factor Is Subsumed In The Determination Of A Reasonable Hourly Rate And May Not Serve As A Basis For Enhancing The Lodestar Amount.

The award of an attorney's fee under fee-shifting statutes is always contingent upon the attainment of "prevailing party" status. The presentation-and selection of a reasonable hourly rate for use in a lodestar calculation is made in light of that known contingency. The amount of a reasonable hourly rate is determined by reference to the prevailing market rate in the relevant community and "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line

with those prevailing in the community for *similar services* by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 895 and n.11 (emphasis added).

Assessment of the contingency factor is an integral part of the selection of a reasonable hourly rate during step one of the *Hensley* calculus. This is consistent with the Court's objective of reducing the opportunity for arbitrary results when it adopted the *Hensley* approach. The resulting lodestar figure therefore necessarily reflects contingency considerations. Any enhancement of the lodestar based on contingent risk of loss, then, is inherently duplicative.

Contrary to the concerns expressed in the concurring and dissenting opinions in *Delaware Valley II*, 483 U.S. at 711, 730, 735, prohibiting enhancement of a lodestar fee does not foreclose consideration of contingency in setting a reasonable attorney's fee. Instead, the prohibition results from the fact that the lodestar calculation already reflects consideration of contingency. The contingency factor cannot serve as an independent basis for enhancing the fee award. *Hensley*, 461 U.S. at 434, n.9; *Blum*, 465 U.S. at 898-900; *Delaware Valley I*, 478 U.S. at 565.

4. Contingency Risk Of Loss Enhancements Of The Lodestar Amount Cannot Be Justified.

The presumption that compensation at a reasonable hourly rate for all hours worked will be sufficient to

attract competent counsel is basic to fee-shifting statutes. Without that presumption, there is no means by which trial courts can make reasoned decisions respecting the proper amount of an attorney's fee award, nor is there any means by which appellate courts can review decisions of the lower courts to enforce the statutory requirement that fee awards be reasonable. Taking the presumption as valid, the enhancement of a lodestar amount computed, as it was in this case, by multiplying all hours claimed to have been expended on litigation by the reasonable hourly rate proposed by Respondents, is not logically supportable. Such a lodestar figure, by definition, represents the maximum reasonable fee which could be awarded under the fee-shifting statutes.

If a fee in excess of the lodestar is awarded, one of two unavoidable conclusions must be drawn – either the attorneys receiving such a fee are being compensated for more hours that they expended on the matter or they are being compensated at larger than reasonable hourly rate. Either result constitutes a windfall, measured by the amount of the enhancement, and represents an abuse of discretion on the part of the court making the award.

As this case illustrates, a correctly computed lodestar amount is more than presumptively indicative of a reasonable attorney's fee. It is the definitive maximum reasonable fee which can be awarded under the fee-shifting statutes.

In its prior decisions on the subject, this Court has made passing reference to the possible circumstances which might justify enhancement of a correctly computed lodestar. Thus, in *Hensley*, the Court held "there remain

other considerations that may lead the district court to adjust the [lodestar] fee upward or downward, including the important factor of "results obtained." 461 U.S. at 434. The Court identified other *Johnson* factors which were not subsumed in the lodestar calculation as possible bases for such adjustments, *id.* at 434, n. 9, and provided that "in some cases of exceptional success, an enhanced award may be justified." In *Blum*, the Court refused to rule out the possibility of an upward adjustment of the lodestar, saying "there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is unreasonably low or unreasonably high." 465 U.S. at 897. The opinion proceeded, however, to hold that the crucial "results obtained" factor would normally not provide an independent basis for *increasing* the fee award. *Id.* at 900. In its most recent decision, the Court observed only that (1) the courts may . . . adjust [the] lodestar calculation by other factors," *Blanchard*, 489 U.S. at 94, but that the lodestar approach was the "centerpiece of attorney's fees awards."

Despite the Court's apparent reluctance to abandon enhancement, it is simply inconceivable that any adjustment factor or combination of factors could ever justify a fee award in excess of a correctly calculated lodestar. No amount of success in obtaining relief would justify a court compensating Respondents' counsel for hours that were not expended or at an excessive hourly rate.

5. The Failure Of The District Court And The Court Of Appeals To Comply With Requirements Set Forth In *Hensley v. Eckerhart* With Respect To The Award Of Attorney's Fees Was Erroneous And Constitutes An Abuse Of Discretion.

For reasons set forth earlier in this brief, the Second Circuit approach to the enhancement fee awards must be rejected. The Circuit's method, followed by the trial court in this case is set forth in *Lewis v. Coughlin*, 801 F.2d 570 (2d Cir. 1986). The trial court is instructed to look to the time that counsel agreed to take the case on a contingency basis and determines if, at that time, competent counsel would have perceived that there was a significant risk of not prevailing and, if so, *might* have refused to accept the case without the *possibility* of fee enhancement. *Lewis*, 801 F.2d at 576. If the answer is in the affirmative, the court may, in its discretion, increase the lodestar fee by whatever amount the court, in its unfettered discretion, deems necessary to bring the fee to the minimal amount necessary to attract competent counsel.

All that a prevailing plaintiff must show, therefore, to be entitled to an enhancement is the existence of a contingent fee arrangement, an averment by counsel that there was a significant risk of not prevailing, and an assertion that competent counsel would not accept the case under those conditions. Not surprisingly, affidavits of counsel in this case to that effect were forthcoming. *See*, Affidavit of Richard Bland (Jt.App. 18-24) (stating that all work associated with the statutory liability claims was taken on a contingent basis and opining that without the opportunity for enhancement, Respondents "would have faced extreme difficulty in finding other counsel of similar

experience to pursue their claims . . . on an hourly rate to be paid only on the contingency of success"); Affidavit of William W. Pearson (Jt.App. 25-28) (opining that applicable laws are complex, technical issues, are sophisticated, and defendant is a political subdivision which does not function or have priorities like a private sector party, thereby increasing the uncertainty of strategy and outcome).[3]

The trial court awarded Respondents attorney's fees of $198,027.50, expenses of $10,929.66 and a 25% risk/contingency enhancement of $49,506.87 on findings that Respondents' attorneys would not have been compensated unless Respondents prevailed, that the risk of not prevailing was substantial as evidenced by the court's denial of the preliminary injunction motion and the fact that Respondents did not ultimately prevail until after trial, and that Respondents would have faced substantial difficulty obtaining competent counsel without the opportunity for enhancement. (App. 133). The court also found that no rare or exceptional circumstances existed, (App. 131), and made no findings as to whether the Respondents' success was exceptional or if the relief

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[3] It is instructive to note that while Mr. Bland's affidavit indicates that the "opportunity" for enhancement was an important factor in his firm's decision to pursue the statutory claims, his affidavit also indicates that he was still in law school in April, 1985, when Respondents became Mr. Pearson's clients. Mr. Pearson said nothing in his affidavit about an opportunity for enhancement as motivating his decision to take the case.

obtained was limited with respect to the litigation as a whole, other than its conclusion that the expenditure of all hours claimed by Respondents' counsel was reasonable because the litigation was complex. (App. 130).

Following the initial award of attorney's fees, the district court, by reference to its previous findings, granted Respondents' Supplemental Application for Fees in the amount of $24,113, expenses in the amount of $2,707.61 and a 25% enhancement of the fees, or $6,028.25 (App. 132). The district court offered no explanation for its decision applying a 25% enhancement.

The Second Circuit Court subsequently granted Respondents' application for fees (Jt.App. 356) in the amount of $53,315 for work associated with the appeal to that court together with $2,240.34 in expenses, but denied their request for a 25% risk enhancement, holding that "the risk" involved in defending on appeal is not significant and, in the circumstances of this case, called for no enhancement. (App. 38-39).

The Second Circuit contingency risk of loss approach to enhancement of the lodestar amount specifically rejects the *Hensley/Blum* requirement that enhancement of the lodestar fee is justified only in cases of exceptional success. *See, e.g., Lewis*, 801 F.2d at 576 ("The district court need not find the results achieved 'exceptional' within the meaning of *Blum*.").

The failure of the district court and the Second Circuit Court of Appeals to consider the relationship between the amount of the fee awarded and the results obtained, *Hensley*, 461 U.S. at 437, their failure to include

in their opinions and orders an explanation of their consideration of the relationship between the amount of the fees awarded and the results obtained, *id.* at 437, and their failure to reduce the lodestar award, as more fully explained in the following section of this brief, all constitute abuses of discretion and require reversal of those awards.

6. The Results Obtained In This Case Are Not Exceptional And Do Not Justify An Increased Fee. The Results Obtained Are, In Fact, So Limited As To Require A Reduction Of The Lodestar Amount.

The awards of attorney's fees made by the district court and the Second Circuit underscore the importance of this Court's holding in *Hensley*, 461 U.S. 424, emphasizing the importance of the "results obtained" justification for any adjustment of the lodestar amount, and requiring that any enhancement be justified by a finding of exceptional success. *Id.* at 435. No enhancement should occur if comparison of the results obtained in the litigation to the lodestar amount indicates that the "prevailing" party enjoyed limited success. This case exemplifies that situation and underscores the importance of the second step in the *Hensley* lodestar approach, a step which both courts below wholly ignored.

The relief sought by Respondents in this case was extensive. See Complaint, App. 244, 267-69. When faced with the complaint, the City was forced to determine whether the public interest justified the expenditure of public funds and the incurrence of other costs which

compliance with the demanded relief would entail. Having concluded that the public interest did not justify those costs, the City defended against the imposition of the relief sought by the Respondents, seeking to preserve its rights under an existing state court order to operate its landfill until January 1, 1990 and to otherwise continue with its planned operations of the landfill. A review of the orders and judgment issued by the district court reveals that the City was entirely successful – none of the relief sought by the Respondents was granted.[4] The status quo ante did not change as a result of the Respondents' complaint or the litigation that followed.

Neither the district court nor the court of appeals considered the relationship of the lodestar to the results obtained in this litigation. Under no reasonable standard could a court, given the facts of this case, conclude that Respondents achieved exceptional success or even excellent results justifying a fully compensatory lodestar award. There should be no enhancement for risk of loss contingency or on any other basis. It is submitted instead that a significant downward adjustment of the lodestar is

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[4] The judgment entered in this matter requiring closure of the landfill on January 1, 1990, should not be misconstrued. The Respondents sought immediate closure of the landfill. As indicated above, the ordered closure date was the same date that had been set for closure prior to the filing of the complaint. The "relief" reflected in the judgment is an indication of the City's position in the litigation, not any success on the part of the Respondents.

required if, indeed, the results obtained in this litigation can justify any award of attorney's fees at all.[5]

CONCLUSION

For the reasons advanced in this brief, Petitioner respectfully submits that this Court should reverse the decision of the Second Circuit Court of Appeals with respect to the award of both the lodestar fees and enhancement thereof and remand this case to the district court for determination of an award of reasonable attorney's fees, if any, consistent with this Court's holdings in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Respectfully submitted,

MICHAEL B. CLAPP
ROBERT R. MCKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, Vermont 05402-0988
(802) 864-5751

Attorneys for Petitioner

March 12, 1992

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[5] See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1986) (A prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.' " (quoting S. Rep. No. 94-1011, p. 4 (1976) quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

(13)

No. 91-810

In The

Supreme Court of the United States

October Term, 1991

CITY OF BURLINGTON,

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

GUY T. SAPERSTEIN
MARI MAYEDA
BARRY GOLDSTEIN
SAPERSTEIN, MAYEDA, LARKIN & GOLDSTEIN
1300 Clay Street
11th Floor
Oakland, CA 94612
(510) 763-9800

Co-Counsel for Respondents

WILLIAM W. PEARSON*
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue
Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

Summary Of The Litigation On The Merits..... 1

Attorneys' Fee Award..... 2

SUMMARY OF ARGUMENT 5

ARGUMENT..... 6

I. A REASONABLE FEE FOR A CASE PROSECUTED ON A CONTINGENT FEE BASIS MAY INCLUDE AN ADJUSTMENT FOR THE CONTINGENT RISK OF LOSS..... 6

A. This Court Consistently Has Accepted Legal Marketplace Principles In Determining What Are Reasonable Fees Under Fee-Shifting Statutes 6

B. Justice O'Connor's Analysis of the Contingent Adjustment in *Delaware Valley II* Is Consistent With This Court's Adherence To Market Principles 12

II. LEGISLATION PROVIDING FOR THE AWARD OF REASONABLE ATTORNEY'S FEES TO A PREVAILING PARTY INCORPORATES LEGAL MARKETPLACE FACTORS..... 13

A. The Language of the Statutes Demonstrate That Congress Did Not Intend to Depart From Its Historic Reliance on the Market Model .. 13

B. The Legislative History Adopts Marketplace Standards For Calculating a "Reasonable Fee" 21

TABLE OF CONTENTS – Continued

Page

C. Recognition of the Risk Premium Is Consistent With The Design, Object and Policy of the Statutes 26

D. Risk Adjustments Do Not Compensate Non-Prevailing Parties 30

III. THE TEST SET FORTH BY JUSTICE O'CONNOR IN *DELAWARE VALLEY II* IS CONSISTENT WITH MARKET PRINCIPLES AND HAS PROVEN WORKABLE 34

A. Nearly All Courts Have Applied Justice O'Connor's Concurrence Correctly 34

B. As With Other Economic Markets, the Legal Marketplace Normally Provides a Risk Premium For Cases Taken on a Contingency-Fee Basis 39

1. Contingency Fee Cases Normally Command Higher Fees than Fees for Work on Noncontingency Matters 39

2. Contingency Enhancements in the Legal Marketplace Find Well-Established Parallels in Modern Economic Theory Regarding How Markets Operate 40

3. Court-Awarded Contingency Enhancements are Nothing More Than the Minimum Risk Premium Required by the Legal Marketplace to Attract Counsel to Fee-Shifting Cases 41

C. The City and *Amici* Seek a Radical Departure from Basic Marketplace Principles 43

TABLE OF CONTENTS – Continued

Page

D. The Objections Made by The City and *Amici* Regarding the Need for and Operation of the Contingency Risk Factor Are Addressed by Justice O'Connor's Two-Prong Test 44

E. Determination of the Appropriate Market-Based Contingency Adjustment is a Judicial, Not Legislative, Task 48

IV. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT AWARDED AN ENHANCEMENT OF THE LODESTAR FEE BASED UPON CONTINGENT RISK 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES

Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959) 16

Blanchard v. Bergeron, 489 U.S. 87 (1989) ..... *passim*

Blank v. Talley Indus., Inc., 390 F.Supp. 1 (S.D.N.Y. 1975) 15

Blum v. Stenson, 465 U.S. 886 (1984) ..... *passim*

Blum v. Witco Chem. Corp., 829 F.2d 367 (3d Cir. 1987) (Blum I) 35

Blum v. Witco Chem. Corp., 888 F.2d 975 (3d Cir. 1989) (Blum II) 35

Bradley v. United States, 410 U.S. 605 (1973) 16

Cherner v. Transitron Electronic Corp., 221 F.Supp. 55 (D.Mass. 1963) *modified on other grounds, Green v. Transitron Electronic Corp.*, 326 F.2d 492 (1st Cir. 1964) 15

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 32, 47

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974) 15

City of Riverside v. Rivera, 477 U.S. 561 (1986) 8

Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1973) 15

Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) 36

Crawford Fitting Co. v. J.T. Gibbons, 482 U.S. 437 (1987) 5, 14, 19, 20

CASES – CONTINUED

Page

Curry v. Contract Fabricators Profit Sharing Plan, 744 F.Supp. 1061 (M.D. Ala. 1988), *aff'd*, 891 F.2d 842 (11th Cir. 1990) 38

Davis v. County of Los Angeles, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974) 24, 25

D'Emanuele v. Montgomery Ward & Co., 904 F.2d 1379 (9th Cir. 1990) 37

Department of Labor v. Triplett, 494 U.S. 715 (1990) 5, 11, 47

Duke v. Uniroyal, Inc., 743 F.Supp. 1218 (E.D.N.C. 1990), *aff'd in part and rev'd in part on other grounds*, 928 F.2d 1413 (4th Cir. 1991) 35

Evans v. Jeff D., 475 U.S. 717 (1986) 28

F.C.C. v. American Broadcasting Co., Inc., 347 U.S. 284 (1954) 17

Fadhl v. City of San Francisco, 859 F.2d 649 (9th Cir. 1988) 37

Franchise Tax Bd. v. United States Postal Service, 467 U.S. 512 (1984) 30

Hasbrouck v. Texaco, Inc., 879 F.2d 632 (9th Cir. 1989) 37

Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991) 37

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hidle v. Geneva County Bd. of Educ., 681 F.Supp. 752 (M.D. Ala. 1988) 39, 46

In re Coordinated Pretrial Proceedings, Etc., 410 F.Supp. 680 (D. Minn. 1975) 15

CASES – CONTINUED

Page

In re Detroit Int'l Bridge Co., 111 F.2d 235 (6th Cir. 1940) 16

In re Gypsum Cases, 386 F.Supp. 959 (N.D. Cal. 1974), *aff'd*, 565 F.2d 1123 (9th Cir. 1977) 15

In re Osofsky, 50 F.2d 925 (1931) 16

In re Wicat Securities Litigation, 671 F.Supp. 726 (D. Utah 1987) 39

Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 33

Islamic Center of Mississippi, Inc. v. Starkville, 876 F.2d 465 (5th Cir. 1989) 36

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 7, 23, 24

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.), *cert. dismissed*, 453 U.S. 950 (1981) 23

King v. Bd. of Regents, 748 F.Supp. 686 (E.D. Wis. 1990) 36

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) 34, 35

Lapina v. Williams, 232 U.S. 78 (1914) 20

Leigh v. Engle, 714 F.Supp. 1465 (N.D. Ill. 1989) 37

Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) 15, 23

Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) 39

CASES – CONTINUED

Page

McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989) 35

McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967) 16

McNary v. Haitian Refugee Center, Inc., 111 S.Ct. 888 (1991) 16

Marks v. United States, 161 U.S. 297 (1896) 14

Martin v. Univ. of South Alabama, 911 F.2d 604 (11th Cir. 1990) 38

Missouri v. Jenkins, 491 U.S. 274 (1989) 5, 8, 9, 10, 30

Morris v. American Nat'l Can Corp., 952 F.2d 200 (8th Cir. 1991) 37, 46

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 31

Norman v. Housing Auth., 836 F.2d 1292 (11th Cir. 1988) 38

Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air, 478 U.S. 556 (1986) ..... *passim*

Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air, 483 U.S. 711 (1987) ..... *passim*

Perlman v. Feldmann, 160 F.Supp. 310 (D. Conn. 1958) 16

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 26

Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 9

Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) 36

Smith v. Freeman, 921 F.2d 1120 (10th Cir. 1990) 37

CASES – CONTINUED

Page

Soto v. Adams Elevator Equip. Co., 941 F.2d 543 (7th Cir. 1991) 36

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987) 35

Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949) 16

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 16

Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978) 23, 24, 25, 28, 45

Steinberg v. Hardy, 93 F.Supp. 873 (D. Conn. 1950) 15

Student Pub. Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988) 35

Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483 (W.D.N.C. 1975) 24, 25

Texas State Teachers Ass'n. v. Garland Indep. School Dist., 489 U.S. 782 (1989) 31

United States v. Great N. R. R. Co., 287 U.S. 144 (1932) 20

United States v. Monia, 317 U.S. 424 (1943) 16

United States v. Wilson, 60 U.S.L.W. 4244 (1992) 17

Vargas v. Calabrese, 750 F.Supp. 677 (D.N.J. 1990) 35

Venegas v. Mitchell, 495 U.S. 82 (1990) 10, 11, 33

Walters v. National Assn. of Radiation Survivors, 473 U.S. 305 (1985) 18, 28, 47

West Virginia Univ. Hosp. v. Casey, 111 S.Ct. 1138 (1991) 14, 17, 19, 20, 32

CASES – CONTINUED

Page

Wolf v. Planned Property Management, 735 F.Supp. 882 (N.D. Ill. 1990) 37

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 38

STATUTES

American-Mexican Chamizal Convention Act of 1964, 22 U.S.C. §277d-21 19

Antitrust Civil Process Act Amendments of 1976, 15 U.S.C. §15g(1)(A)-(B) 18

Black Lung Benefit Act, 30 U.S.C. §§901 *et seq.* 11, 47

Civil Rights Act of 1991 20

Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988 14

Clayton Act of 1914, 15 U.S.C. §15 15

Clean Air Act of 1970, 42 U.S.C. §§7401 *et seq.* 28

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),

42 U.S.C. §§9601 *et seq.* 19

42 U.S.C. §9659(f) 19

Equal Access to Justice Act, 28 U.S.C. §2414(d)(1)(A) 18

Federal Tort Claims Act, 28 U.S.C. §2678 18

Federal Water Pollution Control Act (Clean Water Act),

33 U.S.C. §§1251 ..... *passim*

33 U.S.C. §1362(5) 30

33 U.S.C. §1365(d) 2, 13, 28

STATUTES – CONTINUED

Page

Individuals with Disabilities in Education Act, 20 U.S.C. §1415(e)(4)(B)-(C) 5, 18, 26, 32

Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. §1985 19

National Vaccine Injury Compensation Act, 42 U.S.C. §300aa-15(b) 18

Organic Act of Guam, 48 U.S.C. §1424c(f) 19

Resource Conservation and Recovery Act, 42 U.S.C. §§6901 *et seq.* 1, 4, 14, 22, 30

Securities Act of 1933, 15 U.S.C. §77k(e) 15

Securities Exchange Act of 1934,

15 U.S.C. §78i(e)..... 15

15 U.S.C. §78r(a)..... 15

15 U.S.C. §78u(h)(7)(A)..... 15

Social Security Act, 42 U.S.C. §406(b)(1)..... 18

Solid Waste Disposal Act,

42 U.S.C. §6903(15)..... 30

42 U.S.C. §6972(e) 2, 13

Toxic Substances Control Act,

15 U.S.C. §2618(d) 23

15 U.S.C. §2619(c)(2)..... 23

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MISCELLANEOUS

Page

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Page

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Page

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STATEMENT OF THE CASE

It is undisputed in the record in this case that the market for legal services ordinarily compensates attorneys for the risk taken in contingent cases. This Court must decide whether, regardless of the operation of this market for legal services, the district court lacked authority to consider market treatment of risk in setting a reasonable attorney's fee.

Summary Of The Litigation On The Merits

Seven years ago, in April 1985, Respondents ("Dagues") hired their attorneys to represent them in a lawsuit concerning hazardous wastes dumped into Petitioner's ("City") municipal landfill ("Landfill"). Jt. App. I at 24. The Dagues' attorneys took this case on a contingency fee basis. They assumed the risk of receiving no attorneys' fees at all unless the Dagues prevailed in their lawsuit. Jt. App. at 24 and App. I at 132.

The Dagues own homes next to the Landfill. App. I at 89. Beginning in 1950, thousands of gallons of hazardous waste were dumped in the Landfill. App. I at 94-95. By 1985, methane gas in explosive concentrations was crossing the Landfill boundary onto the Dagues' property. App. I at 99, 102.

On the opposite side of the Landfill from the Dagues' property is a wetland called the Intervale. App. I at 89-90. As a result of tests conducted in 1980, the City learned that Landfill leachate contaminated with hazardous and toxic chemicals was being discharged into the Intervale directly below the Landfill. App. I at 92, 98.

On October 9, 1985, the Dagues filed suit to compel the City to comply with the Clean Water Act, 33 U.S.C. §§1251 *et seq.* ("CWA"), the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 *et seq.* ("RCRA"), and state environmental laws. App. II at 244-69. After a vigorously contested and highly technical trial (App. I at 65-67, 77-81, 133), on October 16, 1989, the district court found that the City had violated the CWA and RCRA (App. I at 87-88), and ordered

the City to close its Landfill and pay the costs of litigation, including reasonable attorney and expert fees under 42 U.S.C. §6972(e) and 33 U.S.C. §1365(d). App. I at 88-89. The Second Circuit affirmed the district court "in all respects." App. I at 37.

Attorneys' Fee Award

In support of their Application for Award of Fees and Costs (Jt. App. I at 5-218), the Dagues filed a memorandum (Jt. App. I at 7-17), two affidavits by trial counsel (Jt. App. I at 17-32), a detailed bill itemizing work, hours, services and rates and expert fees and costs (Jt. App. I at 32-210), and three affidavits by experienced attorneys familiar with the legal marketplace. Jt. App. I at 211-218.

Attorneys William Pearson and Richard Bland provided the vast majority of legal services. Pearson's hourly rates ranged from $85.00 per hour to $125.00 per hour and Bland's ranged from $45.00 per hour to $80.00 per hour. The overall composite hourly rate charged in the Dagues' first fee petition was $64.35 per hour.

The affidavits of experienced counsel established that: (1) the hourly rates the Dagues' attorneys charged were the prevailing rates for hourly work in the Burlington marketplace (Jt. App. I at 212, 215, 217); (2) when contingency fee arrangements are made in the Burlington marketplace, a percentage of fee recovery is fixed at a level which would be larger than for work done on an hourly basis to reflect the risk of no recovery (Jt. App. I at 212, 215); (3) lawyers in the Burlington marketplace who take contingency work expect to receive a multiple of their usual hourly rate if they prevail (Jt. App. I at 217-18); and (4) without this expectation of an enhancement, there is no incentive to take this work (*Id.*).

The City opposed the Dagues' fee application claiming they did not substantially prevail. Jt. App. I at 219-29, 236-81. However, the City neither challenged the reasonableness of the hourly rates (Pet. Brief 6), nor did it counter any

of the Dagues' evidence regarding the operation of the marketplace for legal services. After a hearing, the district court awarded the Dagues a full attorneys' fee lodestar of $198,027.50, plus expenses of $10,929.66, together with a 25% attorneys' fee enhancement. App. I at 130-34. The Court justified the enhancement on the basis of its findings that "plaintiff's attorneys would not have been compensated at all unless plaintiffs prevailed" (App. I at 132), that "the risk of not prevailing was substantial under the facts here," and that "absent an opportunity for enhancement, plaintiff would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." App. I at 132-33.

The Dagues requested a separate delay enhancement given the long history of the case without any fee payment. App. I at 13. The district court refused, deciding that the 25% enhancement was adequate in order to compensate for delay in payment as well as risk. App. I at 133. Therefore, the district court awarded a lodestar that was based only on historic rates without a separate adjustment for the delay in payment.

In affirming the lower court "in all respects," the Second Circuit expressly rejected the City's claim that the Dagues had not substantially prevailed "because, in large part, it was the pressure generated by the plaintiffs' efforts that caused the city to actually close the landfill [and o]nly by bringing this suit against the city were the plaintiffs finally able to get from the city action as opposed to mere promises." App. I at 30-31.

The Second Circuit also affirmed the lower court's lodestar award and the 25% risk enhancement. App. I at 35-37. In particular, the Court affirmed the finding that "without the possibility of fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective

access to the court." App. I at 37.[1] On June 26, 1991, the City filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which was denied on August 20, 1991. App. I at 145-46.

The City filed its Petition for a Writ of Certiorari on November 18, 1991. On January 27, 1992, this Court granted the Petition on the single question of whether courts have authority to consider the risk of nonpayment of any fees in a contingent case when determining a reasonable attorney's fee under the fee shifting provisions in the CWA and RCRA.

The Dagues' attorneys have provided legal services for seven years in a difficult case in a complicated field of law, carried the risk of not receiving any payment for their services, achieved a substantial result for their clients, charged an overall composite rate of $67.58 for their services, and

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[1] On June 25, 1991, following their success in the Second Circuit, the Dagues filed a Supplemental Application for Award of Fees and Costs in the District Court, and an Initial Application For Award of Fees and Costs Incurred on Appeal in the Second Circuit. The District Court Supplemental Application requested a $24,113.00 lodestar, a 25% fee enhancement and $2,707.61 in expenses. Jt. App. II at 311-55. The Second Circuit Application requested a $53,315.00 lodestar, a 25% enhancement and $2,240.00 in expenses. Jt. App. II at 356-417. Both applications were in substantially the same format as the original district court application, including affidavits from experienced attorneys in the legal marketplace. The City did not file any opposing memoranda or affidavits to either of the supplemental applications.

On October 11, 1991, the district court issued an Order granting supplemental attorneys' fees in the amount of $24,113.00, and expenses of $2,707.61, together with a 25% enhancement of the attorneys' fees. App. II at 137-38.

On October 25, 1991, the Second Circuit issued an Order granting the Dagues supplemental attorneys' fees in the amount of $24,113.00, and expenses of $2,707.61 but denied a 25% "risk enhancement" on the ground that the "risk" involved in defending an appeal is not significant. App. I at 38-39.

have not, as of yet, received *any* payment for their time or even reimbursement for their advancement of expert fees and costs.

SUMMARY OF ARGUMENT

In determining what are reasonable attorneys' fees under prevailing party statutes, this Court consistently has relied on the principles and practices of the legal marketplace. *Hensley v. Eckerhart*, 461 U.S. 414 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Missouri v. Jenkins*, 491 U.S. 274 (1989). This Court has repeatedly emphasized the congressional purpose behind fee-shifting statutes as providing incentives for competent private attorneys to enforce civil rights, environmental, and antitrust statutes. *Id.* In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*), a majority of the Court held that legal marketplace conditions may require enhancement of the lodestar fee to account for the risk of loss in order to attract competent counsel to prosecute such cases. In *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court recognized that an adjustment of an attorney's fee for the contingent risk of loss was permitted as part of a "reasonable attorney's fee." *See* Section I, *infra*.

The phrase "reasonable attorney's fee" meant to Congress what it meant in the antitrust and securities statutes that had been earlier enacted by Congress: that the risks of contingent representation may require additional compensation. If Congress intended to limit the courts' consideration of marketplace factors, it would have done so because "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." *Crawford Fitting Co. v. J.T. Gibbons*, 482 U.S. 437, 442 (1987). Congress made such a limitation in the Individuals with Disabilities in Education Act, 20 U.S.C. §1415(e)(4)(C) where "no bonus or multiplier may be used in calculating fees awarded under this subsection." Moreover, the limitation on marketplace factors sought by the City and *amici* was presented to Congress as proposed bills and amendments which were rejected. And, even if reference to legislative history is made, it demonstrates that it was Congress' intent, object and design to adopt marketplace standards for calculating fee awards. In relying on the phrase "prevailing party" to limit the use of marketplace

factors in fees calculation, *amici* confuse the statutes' entitlement standard with their fee calculation standard. That the phrase "prevailing party" speaks to a party's entitlement to fees has been repeatedly recognized in this Court's fees jurisprudence. *See* Section II, *infra*.

Nine circuits have accepted Justice O'Connor's two-prong market test and applied it correctly. Nearly all have done so without difficulty, often on uncontradicted records. An upward adjustment for risk is not automatic under the test; numerous courts have found no need for risk enhancement or that the evidence submitted did not support enhancement. Justice O'Connor's class-based assessment of risk has proven workable.

The City and *amici* do not dispute the marketplace basis of this Court's prior attorney's fees decisions, but simply reject the market's treatment of risk. Their selective rejection of market principles defies the legal marketplace, the statutory language, and well-established principles of market economics. The City and *amici's* proposed *per se* rule prohibiting *any* risk enhancement has no legal or economic basis. *See* Section III, *infra*.

Because the district court, on an undisputed record, correctly held that an enhancement was available to compensate for contingent risk, this Court should affirm the district court's award. *See* Section IV, *infra*.

ARGUMENT

I.

A REASONABLE FEE FOR A CASE PROSECUTED ON A CONTINGENT FEE BASIS MAY INCLUDE AN ADJUSTMENT FOR THE CONTINGENT RISK OF LOSS

A. This Court Consistently Has Accepted Legal Marketplace Principles In Determining What Are Reasonable Fees Under Fee-Shifting Statutes

This Court has consistently relied on legal marketplace principles and practices in determining what are reasonable

attorney's fees under fee-shifting statutes. In fact, in its fees jurisprudence, the Supreme Court has *only* relied on the marketplace to effectuate congressional intent and determine a "reasonable" fee.

In *Hensley v. Eckerhart*, the first case in which this Court provided guidelines for calculating a reasonable attorney's fee pursuant to a major fee-shifting statute, this Court adopted the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) as the foundation for calculating a reasonable fee. *Hensley v. Eckerhart*, 461 U.S. 414, 429-30 n.3 (1983). These twelve factors derive directly from the American Bar Association Code of Professional Responsibility, originally promulgated in 1908 and operative today, as the factors used in the legal marketplace to calculate reasonable attorney's fees. *See, e.g.*, E. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 79 and n.199 (1988).

Moreover, *Hensley* applied the ABA factors with an eye to their use in the private marketplace:

> Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Id. at 434. The Court then held that district courts must consider the reasonable number of hours, the reasonable hourly rate, and "also may consider other factors identified in *Johnson*, . . . " and noted that the inquiry does not end with the lodestar:

> There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."

Id. at n.9.

This Court again relied on the private market in *Blum v. Stenson*, 465 U.S. 886 (1984), which presented the question

of what is a reasonable hourly rate for attorney services under 42 U.S.C. §1988. Petitioner in *Blum* sought to have hourly rates set on a "cost-plus" basis. *Id.* at 892 n.6. The Solicitor General urged the Court to adopt a cost-related standard for non-profit legal services organizations. *Id.* at 892. A unanimous Court rejected these arguments and held that "[t]he statute and legislative history establish that 'reasonable fees' under §1988 are to be calculated according to the prevailing market rates in the relevant community. . . . " *Id.* at 894-95. These "prevailing market rates" are the rates that are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[2] *Id.* at 895 n.11.

In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the Court rejected a proposed rule that a reasonable fee be proportional to the money damages recovered and affirmed an award for all hours reasonably expended at prevailing market rates. Although the dissent considered the award excessive, it recognized that market principles apply to the award of statutory fees:

> The analysis of whether the extraordinary number of hours put in by respondents' attorneys in this case was "reasonable" must be made in light of both the traditional billing practices in the profession, and the fundamental principle that the award of a "reasonable" attorney's fee under §1988 means a fee that would have been deemed reasonable if billed to affluent plaintiffs by their own attorneys.

Id. at 591 (Rehnquist, J., dissenting).

The Court again adhered to legal marketplace principles in *Missouri v. Jenkins*, 491 U.S. 274 (1989). The issues there were whether: (1) an attorney's fee can be enhanced to

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[2] The *Blum* decision also reaffirmed the *Hensley* holding that the lodestar fee could be enhanced, but reversed the enhancement awarded by the district court for lack of supporting evidence. *Id.* at 901-02.

account for delay in receipt of payment, (2) the work of paralegals and law clerks is a compensable part of a reasonable attorney's fee, and, (3) if so, is compensation to be at prevailing market rates. In answering all these questions, the Court held that §1988 requires that market practices be followed:

> The statute specifies a "reasonable" fee for the attorney's work product. In determining how other elements of the attorney's fee are to be calculated, we have consistently looked at the marketplace as one guide to what is "reasonable."

Id. at 285-86.

On the issue of enhancement for delay, the majority stated, "[o]ur cases have repeatedly stressed that attorney's fees awarded under this statute are to be based on market rates for the services rendered" and held that compensation received years after the rendering of services is treated differently than compensation paid contemporaneously. *Id.* at 283.

On the paralegal/law clerk compensation issues, the Court held that paralegal and law clerk time is to be included in reasonable attorney's fees calculations and that market practices are to be followed in determining their amount:

> If an attorney's fee awarded under §1988 is to yield the same level of compensation that would be available from the market, the "increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks" *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983), must be taken into account. . . . Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at "cost."

Id. at 286-87.

The Court held that §1988 only requires that market practices be followed, not that paralegals always be compensated separately at hourly rates:

> Nothing in §1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that §1988 requires.

Id. at 288. The Court rejected Petitioner's claim that this would lead to a "windfall" for attorneys, or to separate billing for secretarial services and office supplies:

> The answer to this question is, of course, that attorneys seeking fees under §1988 would have no basis for requesting separate compensation of such expenses unless this were the prevailing practice in the local community. *The safeguard against the billing at a profit of secretarial services and paper clips is the discipline of the market.*

Id. at 287, n.9 (emphasis added).[3]

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[3] This Court also has accepted and endorsed legal marketplace practices in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), and *Venegas v. Mitchell*, 495 U.S. 82 (1990). Both cases concern the relationship of percentage-based contingent fee agreements and §1988. Although neither case holds that the contingent fee percentage *determines* the reasonable statutory fee, both hold that the statute was designed to incorporate and enhance the incentives for attorneys to prosecute civil rights cases, not limit or restrict market practices and incentives. In *Blanchard*, Justice White, writing for the majority, recognized that the purpose of §1988's fee provisions is "to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large" and that using percentage-based fee agreements as a cap on fees "would create an artificial disincentive for an attorney who enters into a contingent fee agreement. . . . " 489 U.S. at 95-96. In *Venegas*, Justice White, writing for a unanimous Court, made clear that a fee award under §1988 (which had included a 2.0 upward adjustment) did not limit the

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In fact, in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), the Court expressly recognized that the availability of counsel will relate directly to the level of compensation, and that in certain markets, additional compensation – or a risk premium – will and should be reflected in that level of compensation. In *Triplett*, Petitioner challenged the Department of Labor's rule under the Black Lung Benefits Act prohibiting attorneys from recovering payments from their clients, claiming that it would limit the availability of attorneys willing to take contingent cases. However, under the statute, successful litigants were entitled to an award of "reasonable attorney's fees," and the Department's own regulation permitted enhancement to "permit consideration of the attorney's risk of going unpaid." 494 U.S. at 726. Justice Scalia, in reasoning that was adopted by all nine Justices, held that the additional compensation for assuming the risk of nonpayment was consistent with market practices and the statutory provision of a "reasonable attorney's fee":

> the existence in this country of a thriving contingent-fee practice demonstrates that this risk can be compensated for – so it comes down once again to the level of compensation.

Id.

The Court has therefore consistently adopted marketplace principles in its fees jurisprudence. It has accepted that the congressional purpose behind fee-shifting statutes is to provide incentives for competent attorneys to enforce our nation's civil rights and environmental statutes, has embraced the principles and practices of the relevant legal marketplace,

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enforceability of a market-based contingent fee, despite the fact that the fee agreement resulted in a fee more than ten times respondent's normal hourly rate. Again, the Court made clear: the statutory fee provision was not intended to limit market incentives for competent counsel to prosecute civil rights actions. *Venegas*, 495 U.S. at 86-88.

and has accepted contingency risk as part of that market and a permissible component of a "reasonable attorney's fee."

B. Justice O'Connor's Analysis of the Contingent Adjustment in *Delaware Valley II* Is Consistent With This Court's Adherence To Market Principles

Following this long line of Supreme Court decisions adopting the market place analysis as the basis for determining a "reasonable attorney's fee," Justice O'Connor in *Delaware Valley II* ruled that an award of fees to a prevailing plaintiff may properly include an adjustment to compensate for the risk of loss if the relevant market reflects such an adjustment as to the class of litigation. 483 U.S. at 731-33. To avoid arbitrary and conflicting application of the contingency adjustment, Justice O'Connor stated that contingency cases must be treated *as a class*, fee applicants bear the burden of proving the degree to which the relevant market compensates for risk, and enhancements should not be granted on the basis of the particular risks of the case.

Justice White's plurality decision focuses on a different question. Rather than questioning whether a contingency adjustment may be *part of* a reasonable fee as determined by the market, the plurality asks whether the attorney may be awarded "separate compensation," 483 U.S. at 715, and whether Congress intended the risk of loss to be a basis for "increasing an otherwise reasonable fee." *Id.* at 723. The plurality opinion examines the difficulties in assessing a risk adjustment on a case-by-case basis and does not address whether the market can compensate for the risk of loss that is inherent in a class of litigation. The plurality, and indeed, all nine justices reject an individualized *post hoc* determination of the risks. 483 U.S. at 726-27, 731, 745.

The Dagues do not seek to overturn that judgment. Instead, they embrace Justice O'Connor's market-based analysis. By awarding a contingency enhancement based on the market treatment of a class of litigation, and awarding risk

adjustment only insofar as "necessary to bring the fee within the range that would attract competent counsel," (*Id.* at 733), Justice O'Connor's formulation avoids completely the difficult practical problems identified in Justice White's plurality opinion and the possibility of the award of a "windfall" fee. *See* Section III.D, *infra*.

II.

LEGISLATION PROVIDING FOR THE AWARD OF REASONABLE ATTORNEY'S FEES TO A PREVAILING PARTY INCORPORATES LEGAL MARKETPLACE FACTORS

A. The Language of the Statutes Demonstrate That Congress Did Not Intend to Depart from Its Historic Reliance on the Market Model

When Congress enacted the environmental statutes at issue here, the phrase "reasonable attorney's fees" for a prevailing party had a well-established legislative and judicial meaning, which incorporated marketplace factors such as contingent risk. Under the rules of statutory construction, those phrases must be interpreted as they were in the securities and antitrust statutes previously enacted by Congress: to permit a contingent risk adjustment in the appropriate case. Moreover, Congress has put the limitation sought by the City and *amici* in other statutes, but *not* in the statutes presented here. Had Congress intended to prohibit the courts from considering marketplace factors, it would have done so, as it has done in numerous other statutes.

Like many statutes enacted before them, the environmental statutes at issue herein provide for a "reasonable attorney's fee" to the prevailing party. *See* 33 U.S.C. §1365(d); 42 U.S.C. §6972(e). The City and *amici* postulate that Congress abandoned its oft-placed reliance on the legal marketplace as a means of defining the amount of a "reasonable" fee to a prevailing party. To the contrary, the established canons of statutory construction demonstrate that Congress

incorporated marketplace factors, such as adjustments for contingent risk, when it adopted the phrase "reasonable attorney's fee" for the prevailing party.

"[T]he purpose of a statute includes not only what it sets out to change, but what it resolves to leave alone." *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138, 1147 (1991). And, where a statute "contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice" the duty of the Court is to enforce the statute according to its terms. *Id.*

The phrase "reasonable attorney's fee" for the prevailing party had a "clearly accepted meaning" at the time it was incorporated into the statutes at issue here – a meaning that unquestionably included marketplace factors and anticipated adjustments for contingent risk in the appropriate case. "Reasonable attorney's fee" for the prevailing party plainly meant to Congress what it had plainly meant in the marketplace: that the risks of contingent representation may require special compensation.

It is a fundamental rule of statutory construction that words or phrases in a provision that were used in other statutes pertaining to the same subject matter will be construed in the same sense. *Marks v. United States*, 161 U.S. 297, 302-03 (1896); 2A *Sutherland Statutory Construction*, §51.02 (5th ed. 1992). The phrase "reasonable attorney's fee" for a prevailing party occurs in a number of antitrust and securities statutes that were enacted prior to the environmental statutes at issue here.[4] This Court and Congress have stated that these various fee-shifting statutes are to be interpreted "*in pari materia*."[5]

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[4] The Clean Water Act was enacted in 1972, and Congress passed the Resource Conservation and Recovery Act in 1976. The Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988, which also provides for "reasonable attorney's fees," was also enacted in 1976.

[5] *See, e.g., Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 556, 559 (1986) (*Delaware Valley I*); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

One of the earliest prevailing party statutes to use the phrase "reasonable attorney's fee" was the Clayton Act of 1914, 15 U.S.C. §15. That phrase also is in the Securities Act of 1933, 15 U.S.C. §77k(e), and the Securities Exchange Act of 1934, 15 U.S.C. §78i(e), r(a), and u(h)(7)(A). By the mid 1970s, when §1988 and the environmental statutes were enacted, the phrase "reasonable attorney's fee" repeatedly had been interpreted to include marketplace factors, such as the contingent nature of the case.[6]

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[6] *See, e.g., Cherner v. Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963), *modified on other grounds, Green v. Transitron Electronic Corp.*, 326 F.2d 492, 496-97 (1st Cir. 1964) (antitrust; contingency enhancement awarded because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."); *Steinberg v. Hardy*, 93 F.Supp. 873 (D.Conn. 1950) (securities; contingency enhancement awarded, noting that "actions, even when well-founded, will seldom be brought unless counsel can be found" on a contingent basis and that "obviously a retainer on a contingent basis is distinctly less attractive" than a guaranteed hourly rate); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974) (antitrust; risk enhancement available because "despite the most vigorous and competent of efforts, success [in litigation] is never guaranteed"); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) (antitrust; lodestar may be increased to reflect contingent nature of case); *Blank v. Talley Indus., Inc.*, 390 F.Supp. 1, 5 (S.D.N.Y. 1975) (antitrust; $1.4 million fee based in part on contingent risk); *In re Coordinated Pretrial Proceedings, Etc.*, 410 F.Supp. 680, 91 (D. Minn. 1975) (antitrust; enhancements awarded to "take into consideration the contingent nature of this litigation"); *In re Gypsum Cases*, 386 F.Supp. 959, 67 (N.D. Cal. 1974), *aff'd*, 565 F.2d 1123 (9th Cir. 1977) (antitrust; enhancements awarded for contingent risk); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324, 326 (N.D. Ill. 1973) (antitrust; court gave "great weight" to fact that contingent case "ought to yield a greater degree of compensation upon successful prosecution of the

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Legislative language is interpreted with the presumption that Congress had knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 898 (1991); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377-79 (1949). And legal terms in a statute, such as "reasonable attorney's fee" for a prevailing party, are presumed to have been used in their legal sense. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Bradley v. United States*, 410 U.S. 605, 609 (1973).

Here, Congress was enacting the fee provisions against a legislative common law of remarkable consistency and continuity in which "reasonable attorney's fee" for a prevailing party incorporated the marketplace model and, in appropriate cases, the contingent risk enhancement. Since legislative language is interpreted with the assumption that the legislature was aware of existing statutes and judicial decisions, *United*

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action"); *McKittrick v. Gardner*, 378 F.2d 872, 875 (4th Cir. 1967) (social securities disability benefits; "the contingency of compensation is highly relevant in the appraisal" of reasonable attorney's fees within the 25% statutory maximum); *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (securities; remanding fee award and directing lower court to consider contingent risk); *Perlman v. Feldmann*, 160 F.Supp. 310 (D.Conn. 1958) (securities; giving "great weight" to contingent nature of case); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235, 37 (6th Cir. 1940) (bankruptcy reorganization under securities laws which considers "whether the fee is absolute or contingent"). *See also, In re Osofsky*, 50 F.2d 925, 27 (1931) (bankruptcy action; contingency enhancement awarded because "however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts."); F.B. MacKinnon, Contingent Fees For Legal Services: A Report of the American Bar Foundation 26 (1964) ("As we have seen in civil suits for damages under antitrust legislation the claimant is awarded reasonable attorney's fees if the suit is successful . . . The contingent factors, among others, is recognized by the courts in making the award.").

States v. Monia, 317 U.S. 424, 427-30 (1943); *F.C.C. v. American Broadcasting Co., Inc.*, 347 U.S. 284, 297 (1954), Congress' use of the phrase "reasonable attorney's fee" for a prevailing party must be interpreted to include the availability of a contingent risk enhancement.

If Congress meant to abandon its historic understanding of the phrase "reasonable attorney's fee" for a prevailing party, it would have used different words when it legislated the statutes at issue here. As noted by Justice Thomas in *United States v. Wilson*, 60 U.S.L.W. 4244 (1992), it is a "familiar maxim that, when Congress alters the words of a statute, it must intend to change the statute's meaning" (cit. omitted). By parity of reasoning, when Congress does not alter statutory language, its intent is to retain the familiar and accepted meaning. *See West Virginia Univ. Hosp. v. Casey*, 111 S.Ct. 1138, 1147 (1991); 2A *Sutherland Statutory Construction*, §45.12 (5th ed. 1992). Here, Congress did not alter the words of the fee provision because it did not intend to change the well established meaning of "reasonable attorney's fee."

Thus, in *West Virginia University Hosp. v. Casey*, this Court examined congressional changes to the phrase "reasonable attorney's fee" for a prevailing party in a variety of statutes. A comparison of the statutes was proper because statutes are construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." 111 S.Ct. at 1148. Because a number of statutes contained an express grant to a prevailing party of reasonable attorney's fees *plus expert witness fees*, the Court held that the statutory usage indicated that expert fees were an item "*in addition to* attorney's fees." *Id.* at 1142 (emphasis in original). The Court reasoned that Congress would not have engaged in "an inexplicable exercise in redundancy" by changing the language in some statutes. *Id.* at 1143.

The same comparison of congressional changes to the phrase "reasonable attorney's fee" for a prevailing party demonstrates that it is proper for courts to consider the marketplace factor of contingent risk, unless otherwise directed by Congress. When Congress enacted the Individuals with Disabilities in Education Act ("IDEA") in 1986, it specifically prohibited all bonuses or multipliers. In order to alter the usual meaning of the phrase "reasonable attorneys' fee" for a prevailing party, Congress specifically stated that "[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection." 20 U.S.C. §1415(e)(4)(C). Similarly, when Congress passed the Antitrust Civil Process Act Amendments of 1976, the legislators focused considerable attention on the availability of contingent recoveries for private attorneys. As a consequence, both the House and Senate ultimately agreed explicitly to prohibit private attorneys from collecting contingency fees unless the award is determined by a court. 15 U.S.C. §15g(1)(A)-(B).

Thus, had Congress intended to limit the courts' discretion when they calculate a prevailing party's reasonable attorney's fee, it would have imposed express limitations, as it has done in numerous other statutes.[7]

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[7] Slightly more than one-fifth of the fee provisions in the United States Code regulate or limit the prevailing party's attorney's fee in certain types of cases. *See generally* 1 M. Derfner and A. Wolf, *Court Awarded Attorney Fees*, §504 (1991); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding 38 U.S.C. §3404(c), which limits to $10 the fee that may be paid an attorney or agent who represents a veteran); 28 U.S.C. §2412(d)(1)(A) (fee awards under the Equal Access to Justice Act "shall be based upon prevailing market rates . . . except that . . . attorney fees shall not be awarded in excess of $75 per hour . . .); 42 U.S.C. §300aa-15(b) (fee awards under the National Vaccine Injury Compensation Act of 1986 limited to $30,000); 28 U.S.C. §2678 (fees under Federal Tort Claims Act limited to 20% of administrative settlement; 25% of judgment or settlement); 42 U.S.C.

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In contrast to the limitations in myriad fees provisions in the United States Code, Congress included no such wording in the environmental and civil rights statutes. In the same year that Congress enacted the IDEA, 1986, Congress amended the Superfund law (CERCLA), 42 U.S.C. §§9601 *et seq.* to add a citizens' suit provision, which provided for "reasonable attorney's fees," 42 U.S.C. §9659(f), yet did *not* include the restrictive language found in the IDEA. The "reasonable attorney's fees" provision in CERCLA is identical to that found in the CWA and RCRA. As Chief Justice Rehnquist aptly observed in *Crawford Fitting Co.*, 482 U.S. at 442, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." The City seeks to have this Court disregard Congress' selective use of limiting language in other fees statutes. That result is impermissible, because such an interpretation would render Congress' words "an inexplicable exercise in redundancy." *West Virginia Univ. Hosp.*, 111 S.Ct. at 1143.

Congress not only knows how to limit fee enhancements, but it has also rejected proposed legislation that attempted to do so. In 1982, Senator Hatch unsuccessfully proposed an amendment to §1988 which would have prohibited "awards based on contingency factors or multipliers." S. 585, 97th Cong. 2d Sess. §722A(e) (1982). *See Attorney's Fees Awards: Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 13 (1982). In addition, four bills were introduced which would have capped attorney hourly rates levied against government defendants at $75, and eliminated multipliers and bonuses under all federal prevailing party fee provisions. None of

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406(b)(1) (fees under Social Security Act limited to 25% of award); 22 U.S.C. §277d-21 (fees under American-Mexican Chamizal Convention Act of 1964 limited to 10%); 48 U.S.C. §1424c(f) (fees for claims regarding land under Organic Act of Guam limited to 5%); 50 U.S.C. App. §1985 (fees under Japanese-American Evacuation Claims Act of 1948 limited to 10%).

these bills passed.[8] *See* S. 2802, 98th Cong., 2d Sess. (1984); H.R. 5757, 98th Cong. 2d Sess. (1984); S. 1580, 99th Cong. 1st Sess. (1985); and H.R. 3181, 99th Cong. 1st Sess. (1985). As recently as last year, an amendment was proposed as part of the Civil Rights Act of 1991, which would have limited a prevailing party's attorney's fees to 20% of the total award. 137 Cong. Rec. S. 15338-39 (daily ed. Oct. 29, 1991).

The rejection of an amendment indicates that the legislature does not intend the law to include the provision embodied in the rejected amendment. *Lapina v. Williams*, 232 U.S. 78 (1914); *United States v. Great N. R.R. Co.*, 287 U.S. 144, 155 (1932). Thus, the numerous failed attempts to limit the availability of enhancements in the environmental and civil rights area demonstrate that a contingent risk enhancement may be available in appropriate cases.[9]

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[8] In advocating on behalf of the failed bills, the Department of Justice raised many of the same arguments it raises here. *See The Legal Fee Equity Act [S.2802]: Hearing Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 98th Cong., 2d. Sess., 38-41 (1984) (comments and materials submitted by Deputy Attorney General Carol Dinkins that a prohibition against multipliers is required because multipliers subsidize losing cases, create needless litigation, and are difficult for the courts to administer); *Legal Fees Equity Act [S.1580]: Hearing Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 99th Cong. 1st Sess. 47-51 (1985) (comments and materials submitted by Deputy Attorney General Lowell Jensen making same arguments).

[9] This is, moreover, consistent with *Crawford Fitting Co.*, 482 U.S. 437 and *West Virginia Univ. Hosp.*, 111 S.Ct. 1138, where the Court was examining the civil rights and antitrust fees provisions as well as a separate specific statute that governed the topic of expert fees, 28 U.S.C. §1821. The Court described 28 U.S.C. §1821 as a statute which "comprehensively regulated" the kinds of expenses "that a federal court may tax as costs against the losing party." *Crawford Fitting*, 482 U.S. at 440. Applying the well-settled rule that a specific statute will control over a

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Under standard rules of statutory construction, the language of the statutes cannot be interpreted to embody any limit on use of the marketplace factor of contingent risk in an appropriate case. Congress has imposed the limitation sought by the City and *amici*, but not in the statutes at issue here. The City cannot now impute such limitation in the absence of clear congressional intent.

B. The Legislative History Adopts Marketplace Standards For Calculating a "Reasonable Fee"

The legislative history readily demonstrates that Congress adopted marketplace standards for determining a reasonable fee. In enacting §1988, Congress cautioned that "[u]nless the judicial remedy is full and complete, it will remain a meaningless right." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("H.R. Rep."). In light of this goal, Congress gave ample instruction to the courts on how to calculate a "reasonable attorney's fee," repeatedly pointing to a market consideration of the contingent nature of a case.

First, "Congress directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes." *Blum v. Stenson*, 465 U.S. at 893. As the Court noted, *Blanchard v. Bergeron*, 489 U.S. at 95, Congress "clearly" instructed the courts to treat fee calculations in the same manner as other complex federal litigation fee petitions:

> It is intended that the amount of fees awarded under [§1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases.

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general one, the Court held that the provisions of 28 U.S.C. §1821 limited expert fees to $30 per day unless the statutory language indicated otherwise. Here, there is no specific statute such as 28 U.S.C. §1821 and, more importantly, attempts to pass such a specific statute limiting fees have been expressly rejected by the Congress.

S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976) ("S. Rep."). *See also* H.R. Rep. at 8-9 (referring to antitrust cases and noting that "civil rights plaintiffs should not be singled out for different and less favorable treatment.").

In fact, Congress made repeated reference to the backdrop of established judicial standards that incorporated market concepts, and it directed courts to follow those standards. Thus, Congress "intend[ed] that, at a minimum, existing judicial standards . . . should guide the courts." H.R. Rep. at 8. Describing the "reasonable attorney's fees" provision as a "key feature," Congress commented that "[b]ecause other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length." H.R. Rep. at 6.

As noted above, for years prior to the passage of the CWA and RCRA, courts had routinely awarded fee enhancements where appropriate under similar fee-shifting statutes to account for contingent risk in various types of complex litigation. *See* cases cited in IIA, *supra*. Thus, the "existing judicial standards" which Congress intended to govern determinations of a reasonable attorney's fee, and which the courts had already "reviewed, examined and interpreted at some length," included adjustments for the risk premium.

Congress then instructed the courts that "[i]n computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " S. Rep. at 6 [citations omitted]. It was, and is, traditional for attorneys to receive a higher rate of compensation from contingent fee-paying clients. As *amici* admit, "[f]ree legal services confer a substantial benefit on a client. In exchange for that benefit, it is *reasonable* for the attorney to charge a fee to the client, if the case is won, that is greater than the fee [an hourly fee-

paying] client would be charged for the time expended." Brief of District of Columbia at 11 [emphasis added].[10]

Similarly, it is "traditional" for the risk premium for contingent cases to be calculated separately, rather than to be subsumed in the lodestar. *See, e.g.*, Declaration of Chester Kamin at ¶7; Declaration of Chesterfield Smith at ¶10; Declaration of Steven Mayer at ¶8; Declaration of Robert Weinberg at ¶3. *See* Materials lodged by Respondents.

Finally, Congress cited several cases as guideposts for courts to use in determining a reasonable fee. Both the House and Senate reports cite *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), which grafted the long-standing legal market factors "consistent with those recommended by the American Bar Association's Code of

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[10] Courts also have recognized the legal market truism that, in contrast to cases taken with the expectation of a guaranteed hourly fee, contingent cases can, in some cases, compel a risk premium. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973) (no one expects a lawyer who works on a contingent fee to charge as little as he would charge an hourly fee client); *see also Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.) (*en banc*), *cert. dismissed*, 453 U.S. 950 (1981) ("Lawyers who are to be compensated only in the event of victory expect and are entitled to be paid more when successful than those who are assured of compensation regardless of result"); *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978) ("the American Bar Association [has determined] that attorneys deserve higher compensation for contingent than for fixed fee work").

Congress expressly approved the *Lindy* case when it enacted the fee-shifting provisions of the Toxic Substances Control Act, ("TSCA") 15 U.S.C. §§2618(d), 2619(c)(2), and 2620(b)(4)(C). Like the statutes at issue here, all three of TSCA's provisions allow a court to award "reasonable fees for attorneys." The legislative history cites *Lindy* as illustrative of the fact that the amount of a fee award "can be adjusted for factors including, *inter alia*, the contingent nature of the success." *See* House Committee On Interstate and Foreign Commerce, 94th Cong., 2d Sess., Legislative History of the Toxic Substances Control Act 255-56 (Comm. Print 1976).

Professional Responsibility" onto the process of setting a reasonable fee under Title VII's fee-shifting provision. *Id.* at 719. *See* S. Rep. at 6; H.R. Rep. at 8. These twelve ABA factors include consideration of "whether the fee is fixed or contingent."[11] As recognized by Justice White, "[i]n many past cases considering the award of attorney's fees under §1988, we have turned our attention to [*Johnson*]," and the *Johnson* contingency fee factor is "a factor" which "may aid in determining reasonableness." *Blanchard*, 489 U.S. at 93. *See, supra*, at note 3.

In addition to adopting *Johnson*, Congress pointed to three cases where the fee standards were "correctly applied." *Blanchard*, 489 U.S. 87, (examining cases cited in legislative history to determine Congressional intent). S. Rep. at 6. These three cases are *Stanford Daily*, 64 F.R.D. 680; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975); and *Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. ¶ 9444 (C.D. Cal. 1974).

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[11] The City and *amici* concede that this factor is applicable to a fee calculation, but attempt to limit its import by saying that the factor only focuses on the existence of any contract for fees between the attorney and client. This distinction is without significance. A court must look at whether or not the attorney accepted the case on a contingent basis, because "when the plaintiff has agreed to pay its attorney, win or lose, the attorney has not assumed the risk of nonpayment and there is no occasion to adjust the lodestar fee because the case was a risky one." *Delaware Valley II*, 483 U.S. at 716.

Similarly, the plurality in *Delaware Valley II* recognizes that the factor "suggests that the nature of the fee contract between the client and his attorney should be taken into account when determining a reasonable fee," 483 U.S. at 723, but fails to conclude that a higher fee award might be warranted when the nature of the fee contract involves the risk of no recovery. There can be no question that, when Canon 13 of the ABA Canons of Professional Ethics was promulgated in 1908 and amended in 1933, it provided that risk of loss may be a factor in determining the reasonable fee: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation,. . . . "

In approving these cases, Congress embraced a definition of "reasonable attorney's fee" that permits upward adjustments for factors such as contingent risk. In *Stanford Daily*, the court first found 750 hours expended by plaintiffs reasonable and compensable. 64 F.R.D. at 683. Next, the court allowed market-based "fixed-fee" hourly rates averaging $50 per hour, which defendants conceded were reasonable. *Id.* at 684-85. Finally, the court examined the fact that counsel prosecuted the case on a contingent basis, and adjusted the lodestar upward by approximately 27% to provide "full and fair compensation":

> Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee [citations omitted]. These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work . . .
>
> Federal courts' failure to make contingency calculations in determining fees awards, in contrast, would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses". . . .

64 F.R.D. at 685 (citation omitted).

Similarly, in *Swann*, 64 F.R.D. at 484-86, the court held that a "[p]ertinent factor[] in fixing fees" includes whether the fee is "fixed or contingent." Finally, the *Davis* court acknowledged there may sometimes be a need for upward adjustment of the lodestar, 8 Empl. Prac. Dec. ¶ 9444 at 5048, and recognized that the district court's "first hand observations" are important in determining a reasonable fee. *Id.* at 5049 (citation omitted).

None of the cases Congress highlighted supports the kind of marketplace intervention the City and *amici* advance. None

of the cases suggests that an upward adjustment of the lodestar for factors such as contingent risk is prohibited. The legislative history is devoid of such market restraints. In fact, as this Court has noted, "Petitioner's argument that the use of market rates violates congressional intent . . . is flatly contradicted by the legislative history of §1988." *Blum*, 465 U.S. at 894.

To the contrary, Congress explicitly has recognized that reasonable attorney's fee awards under §1988 may include upward enhancements. As noted previously, the fee-shifting provision of the IDEA expressly prohibits the use of a "bonus or multiplier" in calculating "reasonable attorney's fees." 20 U.S.C. §1415(e)(4)(B) & (C). In the Joint Conference Report, *reprinted in* 1986 U.S. Code Cong. & Ad. News 1807, 1808, the House and Senate Conferees noted that by prohibiting upward enhancements in the IDEA, Congress did "not intend in any way to diminish the applicability of interpretation by the U.S. Supreme Court regarding bonuses and multipliers to other statutes such as 42 U.S.C. §1988."

C. Recognition of the Risk Premium Is Consistent With The Design, Object and Policy of the Statutes

In determining the meaning of a statute, the Courts look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). As stated above, Congress' design in enacting these statutes was to follow the market model, and Congress' object and policy was to provide citizens with meaningful access to the courts to vindicate their rights. Failure to recognize and account for contingent risk in determining "reasonable attorneys' fees" would therefore contravene Congress' express design, object and policy.

Congress made findings that a fee structure regulated by marketplace factors was necessary to accomplish its purposes in the civil rights and environmental statutes. As the court

recognized in *Delaware Valley I*, " '[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens,' and unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed." 478 U.S. at 560, *citing* H.R. Rep. at 1.[12] "The purpose of §1988 is to ensure effective access to the judicial process." *Hensley*, 461 U.S. at 429. These factual findings[13]

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[12] The legislative history of §1988 echoes these objectives again and again: *See* S. Rep at 6 ("[§1988] provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing [civil rights] statutes); S. Rep. at 2 ("civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain"); S. Rep. at 5 ("[i]n several hearing held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which [§1988] applies are to be fully enforced"); and S. Rep. at 6 ("[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.")

The legislative history also repeats the concern that poor people in particular have meaningful access to the courts to assert their rights: *See, e.g.*, S. Rep. at 2 ("[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"); H.R. Rep. at 1 ("[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); H.R. Rep. at 3 ("private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so.").

[13] Congress made these findings based on many days of extensive testimony. *See The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Rep. of Citizen Interests of the Senate Judiciary Committee*, 93d Cong., 1st Sess. (1973) and *Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civ. Liberties, and the Admin. of Justice of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975).

made by Congress are entitled to "a great deal of deference." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. at 330 n.12 (1985).

The *Delaware Valley II* plurality postulated that "[i]t may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond. . . . " 483 U.S. at 727. However, Congress found otherwise and, in any event, has relied upon the application of the market in order to *assure* that the bar does respond. *See* Sections IIA and B, *supra*. In particular, Congress wanted to assure that the bar responded to victims of violations of environmental and civil rights statutes because, unlike personal injury cases, these litigants "seek[] to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Blanchard*, 489 U.S. at 96.

Similarly, Congress enacted the CWA's fee-shifting provision, 33 U.S.C. §1365(d), because "it is important to provide that citizens can seek [court enforcement]," and noted that "in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party." S. Rep. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668 at 3746-47.[14]

Congress has "instructed the courts to use the broadest and most effective remedies available to adhere to [these] goals," S. Rep. at 3, and "the fee-shifting provision [is] 'an integral part of the remedies necessary to obtain' compliance with our statutory policies." *Evans v. Jeff. D.*, 475 U.S. 717, 731 (1986). In *Stanford Daily*, 64 F.R.D. 680, the court noted that accounting for contingent risk in setting a reasonable fee

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[14] Congress enacted the fee-shifting provision of RCRA "[drawing] on the similar provisions of the Clean Air Act of 1970 and the [Clean Water Act]." *Delaware Valley I* also noted "the purposes behind both §304(d) [of the Clean Air Act] and §1988 are nearly identical." 478 U.S. at 559.

serves Congress' purpose of providing meaningful and effective access to the courts:

> [Contingent adjustments] help[] attract counsel to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented. . . . From the public's standpoint, the contingent fee helps equalize the access of rich, middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income.

64 F.R.D. at 685.

A "reasonable attorney's fee" must account for contingent risk if Congress' object of providing meaningful and effective access is to be met. As one commentator stated, "the experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." S. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U.Pa.L.Rev. 281, 324-25 (1977). *See also Legal Fees Equity Act [S.1580]: Hearings Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 99th Cong., 1st Sess. 289 (1985), Testimony of Philip Sunderland ("without market-rate compensation and without the possibility of having contingent representation, it is not only economically infeasible [to take on cases], . . . it is economic suicide").

In sum, interpreting the statutory language to allow for contingent adjustments is "reasonable, consistent, and faithful to [the statute's] apparent purpose." *Blanchard*, 489 U.S. at 100 (Scalia, J., concurring). Failure to adhere to market

principles in determining a reasonable fee will result in a failure to follow Congress' design, object and policy.[15]

D. Risk Adjustments Do Not Compensate Non-Prevailing Parties

The Solicitor General contends that including a contingency adjustment in a "reasonable" fee is contrary to the statute, because an adjustment would compensate non-prevailing parties. The Solicitor General has provided no legislative history in support of this interpretation and, as discussed *supra* in Section II, Congress enacted the CWA and RCRA prevailing party fee provisions in view of many other prevailing party fee statutes, pursuant to which contingency adjustments had long been made.

In relying on the phrase "prevailing party" to limit the calculation of fees, *amici* confuse two separate inquires. The prevailing party inquiry defines the types of parties entitled to

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[15] The Solicitor General argues that because the fee-shifting statute constitutes a limited waiver of sovereign immunity, the statute must be construed narrowly. Solicitor General's Brief at 26, n. 24. This issue was raised in the City's Petition for Certiorari, and was not accepted. Moreover, as this Court has held, "[t]he question is what Congress intended – not whether it manifested the clear affirmative intent . . . to waive the sovereign's immunity." *Missouri v. Jenkins*, 491 U.S. 274, 282 (1989); *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984) ("waiver of sovereign immunity is accomplished not by a 'ritualistic formula;' " and "can only be ascertained by reference to underlying congressional policy."). Congress explicitly included government defendants in the CWA and RCRA. *See* 33 U.S.C. §1362(5); 42 U.S.C. §6903(15). Similarly, Congress intended §1988 to apply equally to government and nongovernment defendants: "With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under statutes covered by [§1988]." H.R. Rep. at 7. *See also* S. Rep. at 5. Indeed, Congress has rejected bills which would have limited governmental exposure in fee-shifting statutes in the manner the Solicitor General suggests. *See* pp. 19-20, *supra*.

a fee award, while the reasonable fee inquiry defines the proper calculation of the fee award.

This Court defined the term "prevailing party" in *Texas State Teachers' Assn. v. Garland Indep. School Dist.*, 489 U.S. 782 (1989). Writing for a unanimous Court, Justice O'Connor defined "prevailing party" as an entitlement, rather than a fee calculation term:

> Where . . . a change [in the legal relationship of the parties] has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Id. at 793. The distinction between the entitlement and calculation standards was also noted by the Court in *Hensley*, 461 U.S. 424.

> [The prevailing party standard] is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable'.

461 U.S. at 433.[16]

Where Congress has limited the calculation of the *amount* of fees, it has left the prevailing party standard intact. For example, although the IDEA prohibits risk enhancements, fees are awarded "to the parents or guardian of a

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[16] The legislative history confirms that the phrase "prevailing party" speaks to entitlement to, and not calculation of, a "reasonable attorney's fee." Both the House and Senate Reports cite *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) for the proposition that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " H.R. Rep. at 6; S. Rep. at 5. In fact, the House Report contains a separate section entitled "Prevailing Party," which discusses at length the issue of whether and when a successful litigant is a prevailing party under the statute. The House Report contains a wholly separate section entitled "Reasonable Fees." H.R. Rep. at 8-9.

child or youth with a disability who is the prevailing party." 20 U.S.C. 1415(e)(4)(B). If, as the *amici* argue, the phrase "prevailing party" prohibits risk adjustments, then Congress' limiting language is rendered an "inexplicable exercise in redundancy." *West Virginia Univ. Hosp.*, 111 S.Ct. at 1143. As discussed *supra* at pp. 18-19, Congress used the limiting language of the IDEA and other "prevailing party" statutes when it intended to alter the usual meaning of the fee provision.[17]

Even more simply, only prevailing parties receive payment. The Dagues are prevailing parties. In fact, there is nothing in the record to suggest that the Dagues, or any of their attorneys, have ever lost a case under a federal fee-shifting statute or that they ever will.[18] What Respondents and their attorneys seek in this case is market-based compensation for the risk they took in prosecuting *this case* on a contingent-fee basis, not the risk undertaken in some other case. The legal marketplace compensates for this risk *regardless* of whether an attorney has ever previously litigated a case on a contingent-fee basis or will ever in the future, or whether the attorney has won ten contingent-fee cases in a row or lost ten in a row. Under Justice O'Connor's test, the risk premium is analyzed on a relevant market basis and applies only if necessary to attract competent counsel to such cases, not to pay any non-prevailing party.

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[17] *Amici* argue that the term "prevailing party" operates as a limitation on reasonable fees. To the contrary, this Court has held that Congress' choice of that phrase was intended to broaden, not limit, the availability of fees so that both plaintiffs and defendants could be entitled to fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 (1978). *See also* H.R. Rep. at 6 (under the term "prevailing party," "either a prevailing plaintiff or prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous.")

[18] If Messrs. Pearson and Bland had ever lost a case brought pursuant to a federal fee-shifting statute, the "*parties*" in that case would have received nothing from the fee award in this case.

Moreover, in a private contingent fee situation, an attorney cannot charge one client for the work performed in another case for another client.[19] If the acceptance of a contingency enhancement in private litigation was for the purpose of paying for other failed litigation efforts, contingency fee arrangements would be unethical, if not illegal. Nevertheless, contingency fee arrangements have long been accepted as legal and ethical, *see* ABA Model Code if Professional Responsibility, EC 2-20 and DR 2-106(b)(8); ABA Model Rules of Professional Conduct 1.5(c) (1983), and indeed have been approved by this Court in *Venegas v. Mitchall*, 495 U.S. 82 (1990), and *Blanchard v. Bergeron*, 489 U.S. 87 (1989). Thus, modern jurisprudence recognizes that the contingency enhancement compensates for the risk of loss in *that* case, not actual or potential loss in other cases.[20]

Lastly, although the Solicitor General today argues that a risk adjustment is inconsistent with the "prevailing party" language of the statute, that has not always been the interpretation of the United States. In *Blum v. Stenson*, the Solicitor General, in contending that a public interest attorney was not entitled to a risk adjustment to the lodestar fee, made the following concession:

> Ordinarily, when a lawyer engaged in private practice agrees to represent a client on such terms he may have to forego fee-generating employment.

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[19] An attorney is prohibited from receiving a fee from someone other than the client, unless the client has knowledge and consent of the arrangement. *See* ABA Model Code of Professional Responsibility DR 5-107(A); Model Rules of Professional Conduct, Rule 1.8(f) (1983).

[20] *Amicus* District of Columbia cites *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), for the proposition that fees cannot be assessed against intervenors, and seeks to extend *Zipes* to mean that contingency adjustments assess fees against parties not determined to be non-prevailing. The *Zipes* decision cannot be tortured in this fashion. In *Zipes*, the intervenors were not determined to be wrongdoers and plaintiffs did not prevail against them. Here, fees have been assessed only against the non-prevailing party in favor of the prevailing party.

Some adjustment in the hourly rate of compensation to reflect the greater risk of nonpayment as compared to the private attorney's normal practice may be reasonable in such cases.[15]

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[15]The normal hourly rates charged by counsel engaged in private practice reflect the fact that the client is expected to pay the fee regardless of the outcome of the case. *If recovery of fees depends on the client's success, it may be necessary to allow a slightly higher hourly rate to induce lawyers engaged in private practice to undertake cases covered by Section 1988.*

Solicitor General's Brief at 21, *Blum v. Stenson*, 465 U.S. 886 (1984) (No. 81-1374) (emphases added). This interpretation of a comparable prevailing party statute is simply incompatible with the Solicitor General's current interpretation that a "prevailing party" statute may *never* permit an adjustment of the lodestar hourly rate to reflect the risk of loss.

III.

THE TEST SET FORTH BY JUSTICE O'CONNOR IN *DELAWARE VALLEY II* IS CONSISTENT WITH MARKET PRINCIPLES AND HAS PROVEN WORKABLE

A. Nearly All Courts Have Applied Justice O'Connor's Concurrence Correctly

The Solicitor General correctly notes that nine circuits have followed and applied the market-based test set forth in Justice O'Connor's *Delaware Valley II* concurring opinion.[21] Solicitor General's Brief at 11-12, n. 11. Nearly all courts have not only applied Justice O'Connor's concurrence, but also applied it correctly. Most courts following *Delaware*

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[21] The non-conforming circuits are the Second Circuit, in this case, and the District of Columbia Circuit in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991).

Valley II have relied on testimony of attorneys practicing in the relevant legal market to establish, or dispute, the dearth of counsel and market treatment of risk. In most cases, this testimony was uncontradicted, fact-finding was simple and straight-forward, and an adjustment was made. In other cases, evidence supporting a risk enhancement was found to be insufficient to meet the *Delaware Valley II* test, or was sufficiently impeached so that no adjustment was awarded. Only one circuit has found the fact-finding required by *Delaware Valley II* to be too difficult to adhere to; yet previous panels in that Circuit correctly applied *Delaware Valley II*. *Compare King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) *with McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989).

The Third Circuit follows Justice O'Connor's test, and recognizes that contingency is to be treated on a class basis. That circuit also rejected the notion that econometric studies to quantify the market are required, although it has noted that conclusory affidavits, without sufficient factual foundation, are not sufficient. *Blum v. Witco Chem. Corp.*, 888 F.2d 975, 983 n.2 (3d Cir. 1989) ("*Blum II*"). *See also Vargas v. Calabrese*, 750 F. Supp. 677 (D.N.J. 1990).[22]

The Fourth Circuit also follows Justice O'Connor's test in resolving requests for contingency adjustments. *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987). Enhancements have not necessarily been awarded in all cases. Rather, where defendants demonstrate that there is an ample supply of attorneys willing to prosecute contingent cases without an upward adjustment, contingency enhancements have been denied. *See Duke v. Uniroyal, Inc.*, 743 F. Supp. 1218,

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[22] Thus, *Blum II* clarified earlier Third Circuit decisions. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 380 (3d Cir. 1987) (*Blum I*) (requesting "expert testimony from someone familiar with the economics of the legal profession.") and *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1452 (3d Cir. 1988).

1226 (E.D.N.C. 1990), *aff'd in part and rev'd in part on other grounds*, 928 F.2d 1413 (4th Cir. 1991).

Before the Fifth Circuit will approve a contingency enhancement, there must be evidence in the record and specific findings by the trial court justifying the conclusion that contingency cases are compensated more highly in the private market than other cases and that enhancements are necessary to induce competent counsel to take such cases. *Leroy v. City of Houston*, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988). In reversing and remanding a district court's denial of a contingency premium for failure to make proper findings, the Fifth Circuit stated:

> Justice O'Connor's instructions in *Delaware Valley II* are explicit: the district court must consider whether a contingency enhancement would have been necessary to induce competent counsel to accept such cases at the time the case was undertaken and whether contingency cases as a class were treated differently from noncontingency cases.

Islamic Center of Mississippi Inc. v. Starkville, 876 F.2d 465, 472 (5th Cir. 1989).

Similarly, the Sixth Circuit, applying Justice O'Connor's test, remanded a district court's award of a contingency enhancement because the court did not make specific findings of fact as to the amount and necessity of a risk adjustment. *Conklin v. Lovely*, 834 F.2d 543, 553-54 (6th Cir. 1987).

The Seventh Circuit has clearly adopted Justice O'Connor's test for awarding contingent risk enhancements in cases where the evidence shows that, without the enhancement, plaintiffs would have faced substantial difficulties in finding counsel in the local or other relevant market and that the relevant market compensates for contingent risk. *King v. Board of Regents*, 748 F. Supp. 686, 692-93 (E.D. Wis. 1990).[23] On the other hand, the district courts have not

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[23] *See also, Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n. 3 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991).

awarded contingency adjustments where the evidence was insufficient to satisfy the *Delaware Valley II* test. *Wolf v. Planned Property Management*, 735 F. Supp. 882, 887 (N.D. Ill. 1990); *Leigh v. Engle*, 714 F. Supp. 1465, 1475-76 (N.D. Ill. 1989).

The Eighth Circuit recently found that a plaintiff met the *Delaware Valley II* test based on "undisputed evidence" that very few attorneys were available to prosecute employment discrimination and civil rights cases in the St. Louis Metropolitan area and that a contingency enhancement was necessary to attract counsel to such cases. *Morris v. American Nat'l Can Corp.*, 952 F.2d 200, 205-07 (8th Cir. 1991). However, in cases where the record failed to establish that the unavailability of a risk enhancement would have caused plaintiff substantial difficulty in locating competent counsel, the Eighth Circuit has denied a contingency enhancement. *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991).

The Ninth Circuit has applied the *Delaware Valley II* test correctly in a variety of cases. In *Fadhl v. City of San Francisco*, 859 F.2d 649 (9th Cir. 1988), the Ninth Circuit affirmed a contingency enhancement based on uncontradicted testimony that the legal marketplace, defined as Title VII cases in the San Francisco Bay Area, required an enhancement for attorneys to accept such cases on a contingent fee basis. *Id.* at 650-51. Likewise, in *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989), an antitrust case, the Ninth Circuit affirmed a contingency enhancement under the *Delaware Valley II* test, based on uncontradicted testimony from antitrust counsel. *Id.* at 637. *See also D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379 (9th Cir. 1990).

The Tenth Circuit, in *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) refused to establish a *per se* rule requiring an enhancement in contingent cases. The Tenth Circuit has further directed its district courts to make specific findings of fact, pursuant to *Delaware Valley II* requirements,

before they conclude that a class of contingency cases requires upward adjustment of the lodestar. *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989).

The Eleventh Circuit also holds that the propriety of contingency enhancements is governed by Justice O'Connor's test and has affirmed enhancements where the evidence demonstrates their necessity. *Curry v. Contract Fabricators Profit Sharing Plan*, 744 F.Supp. 1061, 1073 (M.D. Ala. 1988), *aff'd*, 891 F.2d 842, 850 (11th Cir. 1990); *Martin v. Univ. of South Alabama*, 911 F.2d 604, 611 (11th Cir. 1990). In *Norman v. Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988), the Eleventh Circuit upheld the denial of contingency risk enhancement, finding that "the record is absolutely devoid of any evidence that would suggest that enhancement over the rates requested is necessary to attract competent counsel into the field." *Id.*, at 1302, 1306.

Thus, almost without exception, the circuits have understood and followed the market test set forth by Justice O'Connor in *Delaware Valley II*, have required specific evidence to meet the test, and have demonstrated no more difficulty discerning the market treatment of contingency than the courts have in determining market-based hourly rates for attorneys of comparable skill and experience or determining how the relevant market compensates paralegals and law clerks.[24] Claims by the City and *amici* that Justice O'Connor's concurrence has proven to be "unworkable" stand without empirical support.

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[24] Congress, of course, invested the federal courts with far more complicated evaluations of market conditions in antitrust and securities cases. E. Cavanagh, *Attorney's Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 70-71 (1988). No one is suggesting that evaluating market treatment of rates, paralegals, and contingent risk presents even a shadow of the complexity of such cases.

B. As With Other Economic Markets, the Legal Marketplace Normally Provides a Risk Premium For Cases Taken on a Contingency-Fee Basis

1. Contingency Fee Cases Normally Command Higher Fees than Fees for Work on Noncontingency Matters

It is not surprising that most courts have determined that the legal marketplace compensates contingency-fee cases differently than hourly rate representation. In calculating the initial lodestar, most courts employ an hourly rate that is comparable to what is reasonably charged by attorneys with similar skills and experience for *noncontingent* matters. *See, e.g., Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.*, 540 F.2d 102, 117 (3d Cir. 1976); *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 755 (M.D. Ala. 1988); *In re Wicat Securities Litigation*, 671 F.Supp. 726, 732-34 (D. Utah 1987). That rate alone may not adequately compensate the attorney who accepts a case on the condition that he or she receive no payment for a losing effort.

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is so much higher than that of conventional loans. . . .

R. Posner, *Economic Analysis of Law* 534 (3d ed. 1986). It is this distinction between contingency rates and non-contingency rates that may, where the market so demands, provide a basis for an "upward adjustment" of, or a "risk premium" over, the lodestar calculation. *See also* Affidavit of Richard Posner ("[a]n award limited to normal time charges [in an antitrust case] would, in my judgment, typically undercompensate the lawyers for the Class") at 00244; Affidavit of

Frank Easterbrook and Robert Sherwin (under the "market value approach to the calculation of fees" in civil rights cases, the value of the attorneys services may depend "on how the client promises to compensate the lawyer") at D-4.[25]

2. Contingency Enhancements in the Legal Marketplace Find Well-Established Parallels in Modern Economic Theory Regarding How Markets Operate

The "contingency adjustment" at issue before the Court is simply a specific example of a core economic principle called "risk premium." The concept of a risk premium to provide incentives to invest in more risky enterprises has existed since Adam Smith wrote *The Wealth of Nations*,[26] and continues to provide vitality to well-accepted principles in modern economic theory.[27]

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[25] These affidavits are in the materials Respondents lodged with the Court.

[26] In 1776, Smith discussed the relationship between the risk in succeeding in any particular profession and the market wages paid to that profession. Indeed, in discussing the risks inherent in the legal profession, Smith suggested that a 20-to-1 enhancement over wages paid to more secure enterprises would be appropriate.

> How extravagant soever the fees of counselors at law may sometimes appear, their real retribution is never equal to this. . . . The lottery of the law, therefore, is very far from being a perfectly fair lottery; and that, as well as many other liberal and honourable professions, are, in point of pecuniary gain, evidently under-recompenced.

Adam Smith, *The Nature and Causes of the Wealth of Nations* 106 (Modern Library ed. 1937).

[27] The concept of the risk premium in accepted modern economic theory is most recently embodied in the works of economist William Sharpe, who won the 1990 Nobel Prize for his work on the "Capital Asset Pricing Model." *See* W. Sharpe, "*Capital Asset Prices With and Without Negative Holdings*" 46 Journal of Finance 489 (1991).

Today's economic literature exploring various aspects of labor and investment markets[28] regularly refer to and accept the well-established concept of the risk premium. The market will frequently reflect a higher rate of return for an uncertain enterprise or investment over a safe one.

3. Court-Awarded Contingency Enhancements are Nothing More Than the Minimum Risk Premium Required by the Legal Marketplace to Attract Counsel to Fee-Shifting Cases

Enhancements of fee awards by district courts under the typical fee-shifting statute simply reflect that, in some markets, a premium over normal noncontingent hourly rates may be required to attract competent counsel. Rather than being a "windfall for attorneys" above and beyond what is already a "reasonable attorney's fee," the contingency enhancement is a potential risk premium which the market may determine to be part of the reasonable fee. An award that fails to include a risk premium for a contingent case is not a reasonable fee, if the market compensates for this risk.

Amici contend that a contingency enhancement is not necessary because: (1) attorneys may bargain for a percentage of plaintiffs' damage recovery; (2) representation may be

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[28] *See, e.g.*, R. Evans & R. Weinstein, *Ranking Occupations as Risky Income Prospects*, 35 Indus. & Lab. Rel. Rev. 252 (1982); A.G. King, *Occupational Choice, Risk Aversion, and Wealth*, 27 Indus. & Lab. Rel. Rev. 586 (1972); R. Posner, *Economic Analysis of Law*, at 405-410. *See also* R. Posner, *Law and the Theory of Finance: Some Intersections* 54 Geo. Wash. L. Rev. 159, 161 n.5 (1986) ("The higher expected return for riskier investments is a central empirical finding in the finance literature") (citations omitted). One would never expect the market to reflect the value of a Federal Treasury Bill to be the same for volatile common stocks. If the expected returns were the same, no investor would purchase the stocks with their concomitant risk of loss. Thus, the risk premium is the price that the market uses to call forth an adequate supply of investors to undertake riskier investments.

secured through voluntary or *pro bono* efforts; or (3) liability is sometimes a sure thing. The last argument is simply a claim that, in certain classes of cases, there is no risk in assuming a contingent case. If this is so, the plaintiff will be unable to prove that the market in that type of litigation commands a premium for the contingent case, and no premium will be awarded.

Contentions (1) and (2), however, simply reject the market-based approach to determining a reasonable attorneys' fee. The use of percentage recovery or *pro bono* efforts to provide representation to plaintiffs in certain types of litigation, as well as compelling counsel to represent unpopular clients, are *alternatives* to the fee-shifting statutes, alternatives of which Congress was clearly aware when it passed the fee-shifting provisions. *See* note 13 *supra*. In no way does the availability of some limited representation through other means diminish the fact that, in many legal marketplaces, a risk enhancer is necessary to attract competent counsel.[29]

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[29] The Solicitor General also contends that a sufficient number of unemployed or underemployed attorneys are available to prosecute federal fee-shifting cases, and that no risk enhancement is therefore necessary. There is no evidence in the legislative history that Congress intended that important federal policies be enforced primarily by unemployed or underemployed attorneys. Effective enforcement requires providing plaintiffs with lawyers comparable in quality to those representing defendants. Moreover, justifying a "public interest discount" on the ground that some attorneys may have charitable intentions "invokes the interests of the disadvantaged to justify a policy contrary to their interests." S. Berger, 126 U. Pa. L. Rev. at 312.

> The "public interest discount" suffers from yet another faulty premise. Statutory fee provisions are not enacted for the benefit of lawyers; rather, they are enacted for the benefit of the class of persons protected by the statutes. *Reducing the fees awarded on the ground that lawyers should be inspired by their sense of civic responsibility reduces the economic*

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C. The City and Amici Seek a Radical Departure from Basic Marketplace Principles

The City and *amici* do not dispute the marketplace basis of this Court's prior fees decisions. In fact, they acknowledge it. *See* Wash. Legal Found.'s Brief at 8-9: "All nine justices [in *Delaware Valley II*] appear to [agree] that any contingency enhancement should focus primarily on market-wide conditions. . . . " Moreover, the City and *amici* do not dispute the applicability of legal marketplace practices with regard to reasonable hourly rates, reasonable number of hours, and compensation for paralegals. Despite these admissions, they turn their backs on market practices regarding contingent risk. This *selective* acceptance of market treatment of reasonableness is contradicted by this Court's fees jurisprudence, the text of fee-shifting statutes, and legislative history regarding reasonable fees. *See*, Sections I, II.A and II.B, *supra*.

The City, with no supporting evidence, ignores market practices regarding contingent risk and baldly asserts that the reasonable hourly rate used in the lodestar calculation "necessarily reflects contingency considerations." Pet. Brief at 18. Nowhere does the City explain how a market hourly rate includes a contingency adjustment. *See* p. 23, *supra*.

The difference between an hourly rate and contingent fee engagement can be illustrated as follows. In one case, an attorney is hired at his or her normal hourly rate. The client agrees to pay hourly fees and all costs, including litigation expenses as billed on a monthly basis, win, lose or draw. The attorney receives payment on a monthly basis for 3,000 hours of time over a seven year period; the client also pays $80,000 in costs and expert fees.

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> *attractiveness of such cases, thereby restricting the supply of legal resources made available. . . .*

Id. at 312-315 (emphasis added).

In another case, an attorney receives no payment for seven years, during which time 3,000 hours and $80,000 in costs and expert fees are expended. The attorney has a right to be paid only if he or she prevails in the case. A losing case will cost the attorney the value of the time and expenses, because the client is incapable of paying costs. The case is successful; the client prevails. The client, however, does not meekly pay the attorney's bill after seven years of work. Instead, the client disputes nearly all parts of the attorney's fee and cost bill, and the attorney is forced to file a motion with the court, and defend an appeal, in order to be paid for the work and the underlying costs. The attorney earns no interest on the $80,000 advanced for costs.

The same fee would not be reasonable in both cases, nor would the legal marketplace treat these two types of representation the same. The City and *amici* would, however, treat them the same and would prohibit the courts from considering any evidence from the legal market. They fail to explain, however, why evidence of relevant market practices should be ignored or why market practices properly can be relied on to calculate a "reasonable" lodestar fee, but not a contingency adjustment.

D. The Objections Made by The City and *Amici* Regarding the Need for and Operation of the Contingency Risk Factor Are Addressed by Justice O'Connor's Two-Prong Test

Many of the City and *amici*'s objections to Justice O'Connor's test have been addressed. The remainder, addressed here, misunderstand her test, exaggerate the concerns or are otherwise without merit.

First, the Solicitor General contends that the class-based market test fails to identify the "relevant market." This alleged "difficulty," however, is no different than the inquiry undertaken in connection with lodestar hourly rates, which requires courts to determine the market rate for the particular

type of case and geographic area. That relevant market analysis is properly left open for district courts. *See* H. Newberg, *Attorney Fee Awards* §4.14, at 142 (1986) ("*Blum* deliberately adopted a flexible, undefined relevant community standard that leaves room for courts to adopt different geographical and litigation specialty approaches that best suit the particular circumstances involved"). *See also* Section III.E *infra*.

The Solicitor General next argues that Justice O'Connor's test is "unworkable" because (1) there is no incentive to control the size of the fee, and (2) if enhancements are "routinely" awarded, attorneys would decline to accept cases on a guaranteed, hourly rate basis. Again, Justice O'Connor's test addresses these concerns. If the attorney declined representation on a guaranteed, hourly rate basis, that attorney would not satisfy the test and obtain an enhancement.[30] If the attorney billed more than a reasonable *number* of hours, this would be reduced as part of the lodestar calculation. Likewise, whether any particular hourly rate is discounted for "billing judgment" or poor results is again a market-based lodestar determination.[31]

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[30] The American Bar Association's Standing Committee on Ethics and Professional Responsibility considers an attorney's failure to offer a client an hourly rate contract before accepting a case on a contingent-fee basis to be a violation of professional ethics. ABA Standing Committee on Ethics and Professional Responsibility Informal Opinion, 86-1521 "Offering Alternatives to Contingent Fees" (1986).

[31] The notion that the contingent fee attorney has an incentive to unnecessarily increase hours defies common sense. The risk of receiving no compensation is enough incentive to expend only those hours reasonably necessary to win the case. *See Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 (N.D. Cal. 1974) ("plaintiffs' attorneys, who had no assurance that attorneys' fees would eventually be granted, had incentive to minimize rather than maximize the amount of time spent on the case"). Moreover, an increased expenditure of time will not decrease the risk inherent in a class of litigation. By analogy, if an investor is offered an investment stock that has a 50% chance of an attractive return and a 50%

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The Solicitor General also argues that Justice O'Connor's test requires a "particularized" factual inquiry into the individual plaintiff's "actual difficulties" in retaining counsel rather than the general shortage of attorneys for types of cases. In the next breath, he acknowledges that the O'Connor concurrence expressly prohibits the particularized assessment of risk. In fact, the courts correctly have focused on the general dearth of counsel for certain types of cases, not the difficulty any particular plaintiff had in finding counsel. *See, e.g., Morris v. American Can Corp.*, 952 F.2d 200, 205 (1991); *Spell v. McDaniel*, 824 F.2d at 1405; *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 751-58 (M.D. Ala. 1988). Moreover, all nine justices in *Delaware Valley II* rejected a particularized inquiry. *See* pp. 12-13, above.

The Solicitor General then claims that Justice O'Connor's test is "unworkable" because it relies on "self-serving" affidavits. Affidavits in support of – or in opposition to – contingency adjustments are no more "self-serving" than affidavits regarding reasonable hourly rates, the reasonable number of hours, the quality of legal representation, or the "exceptional success" of the results achieved. If any particular testimony is biased, or without proper foundation, defendants can point that out and/or submit counter-evidence. The trial courts can be relied upon to separate the real from the imagined. Indeed, as this Court has stated, the district courts

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chance of total loss, he or she may be willing to purchase 50 or 100 shares, but will hardly be willing to risk all of his or her assets in that same stock. And, regardless of the size of the investment, the 50-50 risk always remains the same. Thus, while the attorney who is paid for all hours worked, win or lose, may have an incentive to increase the hours billed, an attorney paid on a contingent basis (and who will have to run the gauntlet of a federal court fee application) will have every incentive to moderate the time/cost investment, due to the uncertainty of payment.

have "superior understanding" of such factual matters.[32] *Hensley*, 461 U.S. at 437.

The Washington Legal Foundation claims that Justice O'Connor's test would defeat the "rare and exceptional circumstances" rule. No Supreme Court case, including *Delaware Valley II*, has applied the "rare and exceptional" test to contingency adjustments. Were contingency adjustments available only in "rare and exceptional" cases, it would be contrary to legal marketplace treatment of risk, and would *require* a particularized, *post-hoc* analysis to determine if the risk undertaken in that case greatly exceeded normal risk levels.

This *amicus* argues that accounting for contingent risk will result in "nonmeritorious civil rights and environmental law complaints." Wash. Legal Found.'s Brief at 18. Congress responded to this concern by providing fees for prevailing defendants where the case was "frivolous, unreasonable, or without foundation," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), not by limiting the calculation of an otherwise reasonable fee as it has done in numerous other statutes. *See* Section II.A.

The *amicus* further contends that if contingency can be reflected in a fee, "[t]here is no limiting principle" on contingency adjustments. That obviously has not happened under *Delaware Valley II*. *See* Section III.A. Moreover, it could not

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[32] The level of proof of unavailability of counsel required in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), is not applicable here. In *Triplett*, the anecdotal evidence submitted sought to attack the constitutionality of the implementation of the Black Lung Benefit Act, 30 U.S.C. §§901 et. seq. This Court noted "the heavy presumption of constitutionality" and held, as it had in *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305 (1985), that anyone challenging the law on constitutional grounds had to make "an extraordinarily strong showing . . . to warrant a holding that the fee limitation denies claimants due process of law." *Triplett*, 494 U.S. at 722.

happen. The "limiting principle" of the O'Connor concurrence is the class-based assessment of risk and the directive that any contingency enhancement be no "more than necessary to bring the fee within the range that would attract competent counsel." *Delaware Valley II*, at 733.

E. Determination of the Appropriate Market-Based Contingency Adjustment is a Judicial, Not Legislative, Task

The Solicitor General and the District of Columbia suggest that Congress should sit as a legislative price control board that directs the appropriate payment for legal services on a nationwide basis. Solicitor General's Brief at 25-26; District of Columbia's Brief at 24-26. These *amici* assert that Congress is better able to direct a fair payment for legal work involving compensation for risk than the courts are able to evaluate how the free market compensates such work, despite this Court's emphasis that the district court has "superior understanding" of such factual matters. *Hensley*, 461 U.S. at 437.

The short answer is that when Congress decides to intervene with the market and set the level of attorney compensation, it says so in the statute. *See supra* at pp. 17-19. However, where Congress *does not* impose such restrictions, it relies upon the courts to evaluate the operation of the legal marketplace. The market for legal services is not monolithic: it is not a uniform, national market that applies in the same manner to all the various types of cases brought pursuant to statutes that contain fees provisions. Nor is the free market static. District courts are well suited to making specific fact-finding decisions about the operation of the legal market at specific locations and at particular times with respect to a certain type of case, just as courts are relied upon to make other complex decisions regarding the market. *See* note 24, *supra*.

The courts make these kinds of findings regarding hourly rates and other matters related to the determination of the lodestar. The City and *amici* do not, and cannot, contest this.

There is no basis for concluding that courts are able to determine some aspects of the market, but not the market for risk compensation.

IV.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT AWARDED AN ENHANCEMENT OF THE LODESTAR FEE BASED UPON CONTINGENT RISK

The district court properly held that a "reasonable attorney's fee" under the applicable federal fee-shifting statutes may include an enhancement of the lodestar fee to compensate for contingent risk. App. I at 130-33. Based on the evidence submitted, the district court found that the Dagues were entitled to a 25% contingent risk enhancement. App. I at 133. The Second Circuit agreed with the district court's determination that contingent risk may be taken into account in calculating a reasonable attorney's fee. App. I at 35-37. It concluded that the district court's award of a 25% enhancement was supported by its findings and affirmed it. App. I at 34-37. Because it was within the authority of the lower court to adjust the lodestar fee to compensate for contingent risk, the district court's ruling should be affirmed.

The City criticizes the adequacy of the affidavits the Dagues submitted to support their enhancement request. However, the City did not raise the sufficiency of the evidence supporting the fee enhancement in its appeal to the Second Circuit nor in its petition for *certiorari*. Moreover, this Court's grant of *certiorari* does not encompass this inquiry. The Court's order granting *certiorari* is limited to the issue of whether a court may, in determining a reasonable attorney's fee under the environmental statutes, enhance the lodestar fee to account for contingent risk.[33]

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[33] The City urges this Court to remand the fee award to the district court not only to vacate the risk enhancement but also to reduce the

(Continued on following page)

Even if the issue were properly before this Court, this Court need not, and indeed should not, address it. Instead, the case should be remanded to the district court for reconsideration of the risk enhancement calculation, consistent with Justice O'Connor's test. As discussed in Section III.E, *supra*, the district court is keenly familiar with the facts relevant to the inquiry. It is in the best position to evaluate the unique evidence of the local Burlington legal market's treatment of contingent risk and the availability of counsel to take complex cases such as this one.

CONCLUSION

Respondents request that this Court affirm the fee enhancement for contingent risk awarded by the district court.

GUY T. SAPERTEIN
MARI MAYEDA
BARRY GOLDSTEIN
JOCELYN D. LARKIN
DONNA RYU
JEREMY FRIEDMAN
LINDA M. DARDARIAN
SAPERSTEIN, MAYEDA,
LARKIN & GOLDSTEIN
1300 Clay Street,
11th Floor
Oakland, CA 94612
(510) 763-9800

WILLIAM W. PEARSON*
MOLLOY, JONES & DONAHUE, P.C.
33 North Stone Avenue,
Suite 2100
Tucson, Arizona 85701
(602) 620-5520

Counsel of Record for Respondents

(Continued from previous page)

lodestar figure. Pet. Brief at 24-26. The City argues that the results obtained in the litigation were limited and do not justify the lodestar amount, citing *Hensley*, 461 U.S. at 429. The district court rejected this same argument below, as did the Second Circuit. As stated above, *certiorari* was granted only on the issue of the availability of contingent risk enhancements. Accordingly, the issue of the propriety of the lodestar figure under *Hensley* is not before this Court.

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CITY OF BURLINGTON

Petitioner,

vs.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

Michael B. Clapp*
Robert R. McKearin
Frederick S. Lane III
Dinse, Erdmann & Clapp
209 Battery Street
Burlington, Vermont 05402-0988
Telephone: (802-864-5751)
Counsel for Petitioner

*Counsel of Record

TABLE OF CONTENTS

ARGUMENT

a. The lodestar hourly rate is determined by evidence of how the relevant market actually compensates for similar services. 1

B. Enhancement of the lodestar rate to reflect risk of loss contingency should not be allowed. 2

TABLE OF AUTHORITIES

CASES

Page

Blum v. Stenson,
465 U.S. 886 (1984) 1

Hensley v. Eckerhart,
461 U.S. 424 (1983) 1

Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air,
478 U.S. 546 (1986) 1

ARGUMENT

Respondent and their amici contend that the district court, in awarding reasonable attorney's fees, should be free to substitute its judgment as to what a market rate theoretically should be for what the evidence shows the actual market rate to be. It was precisely this sort of arbitrary result which led this Court to reject the approach theretofore adopted by the Third Circuit and to endorse the particular lodestar method of fee calculation set forth in Hensley v. Eckerhart, 461 U. S. 424 (1933); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 561-566 (1986). The same rationale should lead the Court to reject Respondents' argument today.

A. The lodestar hourly rate is determined by evidence of how the relevant market actually compensates for similar services.

The Hensley lodestar method requires that the lodestar hourly rate be determined from evidence as to rate at which attorneys of similar skill, experience and reputation are actually compensated in the relevant market. Blum v. Stenson, 465 U.S. 886, 888-895 (1984) (text and footnote 11 thereto). The actual rate of market compensation is not determined by reference to what Respondents' counsel hopes to obtain by way of a fee award or by reference to economic theory. Neither is it determined by parsing out its the various components of the market value and assigning value to them. It is determined instead by hard evidence of what the market actually pays on an hourly basis for those services.

There is simply no need for a court to delve into the particular components that together make the total of the lodestar hourly rate. What the court needs to know for the purpose of setting fees is the market hourly rate. Its purpose is served by evidence indicating that rate. It is the market itself that decides the importance which is attributed to particular components of the total, not the courts. Therefore, the extent, if any, to which the market rate reflects risk of loss contingency is not of any import in setting reasonable attorney's fees. If the market compensates for risk of loss contingency, determination of the market rate subsumes and incorporates that factor. If the relevant market does not recognize and compensate for risk of loss contingency the market rate will not and should not reflect that factor. When a lodestar award of fees is made based upon the objectively determined reasonable hourly rate, therefore, the award will reflect risk of loss compensation exactly to the extent the relevant legal market recognizes and provides compensation for such risk assumption to attorneys practicing in that market. It is the market, not the court, in other words, that determines what is reflected in the reasonable hourly rate.

B. Enhancement of the lodestar rate to reflect risk of loss contingency should not be allowed.

Any effort to increase a lodestar award by use of a contingency factor or multiplier necessarily takes a court out of its role as an objective factfinder and forces it to formulate subjective policy decisions - a legislative, not a judicial function. It is simply impossible for this Court or any other

court to objectively determine what multiplier to apply to a lodestar fee to reflect compensation for assuming a contingent risk of loss without making those policy decisions. Any such decision by a district court to enhance a lodestar fee represents a windfall. If the market recognizes and compensates for risk contingency, then the enhancement duplicates compensation already reflected in the lodestar rate. If the market does not recognize and compensate for risk contingency, then the enhancement represents compensation that is not available in the relevant market. Whether a prevailing party should receive such additional compensation or any compensation for risk of loss contingency beyond what the market provides are complex and politically based. Any such decisions should be made by Congress, not the courts. Policy considerations of that nature should be left for congressional determination.

Respectfully submitted,

MICHAEL B. CLAPP
ROBERT R. McKEARIN
FREDERICK S. LANE III
DINSE, ERDMANN & CLAPP
209 Battery Street
Burlington, VT 05402-0988
(802) 864 5751

Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON, PETITIONER

v.

ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
MARK R. HAAG
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The petition for a writ of certiorari was granted only as to the following question: May a court, in determining a reasonable attorney's fee award under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. 6972(e), or Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	3
Argument:	
Statutes requiring reasonable attorney's fees to be paid to a prevailing party do not authorize the award of contingency fee enhancements over and above the lodestar	4
A. This Court has established a presumption that the lodestar ordinarily represents a reasonable fee	4
B. The statutory language should not be interpreted to authorize the award of enhancements because the lodestar establishes the reasonable attorney's fee necessary to compensate a prevailing party	12
1. Contingency enhancements conflict with the statutory language by improperly compensating persons who were not "prevailing parties"	13
2. Contingency enhancements are not necessary to ensure that parties will be able to obtain representation	16
3. The test of the *Delaware Valley II* concurrence has proven to be unworkable	18
4. The legislative history of Section 1988 does not support the lower court's conclusion that contingency fee enhancements were authorized by Congress	23
Conclusion	25

TABLE OF AUTHORITIES

Cases:	
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975)	4, 5

Cases—Continued: Page

Blanchard v. *Bergeron*, 489 U.S. 87 (1989) 9, 17
Blum v. *Stenson*, 465 U.S. 886 (1984) 9, 10, 12, 23, 25
Blum v. *Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987) 11, 21
City of Riverside v. *Rivera*, 477 U.S. 561 (1986) 20
Copeland v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) 14
Craig v. *Secretary, HHS*, 864 F.2d 324 (4th Cir. 1989) 11
Davis v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974) 24
D'Emanuele v. *Montgomery Ward & Co.*, 904 F.2d 1379 (9th Cir. 1990) 11
Department of Labor v. *Triplett*, 494 U.S. 715 (1990) 21
Eastern Transportation Co. v. *United States*, 272 U.S. 675 (1927) 26
Fadhl v. *City of San Francisco*, 859 F.2d 649 (9th Cir. 1988) 11, 12
Friends of the Earth v. *Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987) 2
Hendrickson v. *Branstad*, 934 F.2d 158 (8th Cir. 1991) 11
Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 4-5, 6, 7, 8, 15, 16
Hewitt v. *Helms*, 482 U.S. 755 (1987) 7
Johnson v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) 6, 7, 23, 24, 25
Jones v. *Diamond*, 636 F.2d 1364 (5th Cir.), cert. granted, 452 U.S. 959, dismissed by agreement, 453 U.S. 950 (1981) 14
King v. *Palmer*:
906 F.2d 762 (1990), rev'd, 950 F.2d 771 (D.C. Cir. 1991) 25-26
950 F.2d 771 (D.C. Cir. 1991) 11, 12, 21, 22, 24
Laffey v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985) 15
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 26
Leroy v. *City of Houston*, 831 F.2d 576 (5th Cir. 1987), cert. denied, 486 U.S. 1008 (1988) 11

Cases—Continued: Page

Lewis v. *Coughlin*, 801 F.2d 570 (2d Cir. 1986) 2
Library of Congress v. *Shaw*, 478 U.S. 310 (1986) .. 26
Lindy Bros. Builders, Inc. v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) 14
McKenzie v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989) 11, 12, 23
McKinnon v. *City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984) 15, 21
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 20
Murray v. *Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984) 14, 15
Nadeau v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) 7-8
Norman v. *Housing Auth.*, 836 F.2d 1292 (11th Cir. 1988) 12, 21
Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) 5, 7, 9, 12, 24
Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) .....*passim*
Public Interest Research Group v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991) 17
Rode v. *Dellarciprete*, 892 F.2d 1177 (3d Cir. 1990) 11
Ruckelshaus v. *Sierra Club*, 463 U.S. 681 (1983) 15, 16, 26
Sierra Club v. *Union Oil Co.*, 813 F.2d 1480 (9th Cir. 1987), remanded, 485 U.S. 931 (1988) 17
Skelton v. *General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988) 11
Smith v. *Freeman*, 921 F.2d 1120 (10th Cir. 1990) 11-12
Spell v. *McDaniel*, 824 F.2d 1380 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988) 11
Stanford Daily v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978) 14, 15, 24, 25
Student Pub. Interest Research Group v. *AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) .. 11

Cases—Continued: Page

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, F.R.D. 483 (W.D.N.C. 1975) 24
Texas State Teachers Ass'n v. *Garland Independent School District*, 489 U.S. 782 (1989) 7, 17
Venegas v. *Mitchell*, 495 U.S. 82 (1990) 9, 10, 17
Wulf v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989) 12

Statutes:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k) 1, 5, 20
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ..... 5, 6, 7, 15, 23
Clayton Act, 15 U.S.C. 15 5
Clean Air Act, 42 U.S.C. 7401 *et seq.*:
42 U.S.C. 7413(b) 5
42 U.S.C. 7604(d) § 304(d) 5, 15
42 U.S.C. 7607(f) (§ 307(f)) 5
42 U.S.C. 7622(b)(2)(B) 5
Consumer Product Safety Act, 15 U.S.C. 2051 *et seq.*:
15 U.S.C. 2060(c) 5
15 U.S.C. 2060(f) 5
15 U.S.C. 2072(a) 5
15 U.S.C. 2073 5
Copyright Act, 17 U.S.C. 505 5
Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.*:
§ 301, 33 U.S.C. 1311 17
§ 308, 33 U.S.C. 1318 17
§ 402, 33 U.S.C. 1342 17
§ 505(a), 33 U.S.C. 1365(a) 20
§ 505(d), 33 U.S.C. 1365(d) 1, 6, 20
Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c *et seq.*:
15 U.S.C. 15c(a)(2) 5
15 U.S.C. 15c(d)(2) 5
15 U.S.C. 26 5

Statutes—Continued: Page

Solid Waste Disposal Act:
§ 7002(a), 42 U.S.C. 6972(a) 20
§ 7002(e), 42 U.S.C. 6972(e) 1, 6, 20
Trademark Act, 15 U.S.C. 1117 5
Truth in Lending Act, § 130(a), 15 U.S.C. 1640(a) 5

Miscellaneous:

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 15
Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977) 14
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 5, 6, 7
Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981) 23
H. Newberg, *Attorney Fee Awards* (1986 & Supp. 1991) 18
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) 5
S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) 6, 7, 24

In the Supreme Court of the United States

OCTOBER TERM, 1991

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CITY OF BURLINGTON, PETITIONER

v.

ERNEST DAGUE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States is frequently a defendant subject to liability for attorney's fees in cases brought under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. 6972(e) and Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1365(d). The United States has similar exposure to fee awards under more than 100 other statutes, including Title VII and other anti-discrimination statutes. Given the large number of such awards annually, a decision concerning the availability of contingency enhancements carries enormous fiscal consequences to the United States. On the other hand, the government is also concerned that fees available for private enforcement of federal

statutes be adequate to ensure that meritorious suits will be pursued.

STATEMENT

This litigation concerned environmental challenges to petitioner's operation of a municipal landfill on property adjacent to property owned by respondents. Respondents' complaint alleged violations of the Solid Waste Disposal Act (SWDA), the Clean Water Act, and state law, and sought a variety of relief, including costs and attorney's fees. After a bench trial, the district court found that petitioner had violated certain provisions of SWDA, the Clean Water Act, and state law, and ordered injunctive relief. Pet. App. 59-115.

With regard to the fee petition, the district court found that respondents had substantially prevailed and awarded them $247,534.37 in attorney's fees. This award included a "lodestar" amount of $198,027.50, plus a 25% contingency enhancement of $49,506.87. Pet. App. 133-134. Following applicable Second Circuit precedent, the district court reasoned that "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts." Pet. App. 132 (quoting *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d 295, 298 (1987), and *Lewis* v. *Coughlin*, 801 F.2d 570, 576 (1986)).

The court of appeals affirmed. In its analysis of the contingency fee enhancement issue, the court concluded that none of the three separate opinions in *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware Valley II*) was dispositive, and that "the issues of whether and when a contingency enhancement is warranted are open issues for the Supreme Court yet to decide." Pet. App. 36. On that basis, the Second Circuit reasoned that its own prior decisions remained the controlling precedent, which the district court had properly applied in determining that a 25% enhancement was appropriate. Pet. App. 37.

The City of Burlington then filed a petition for a writ of certiorari. The petition presented a number of questions, but this Court limited its grant of the writ to the question of whether the contingency fee enhancement was permissible under the statute.[1]

SUMMARY OF ARGUMENT

Under the typical fee-shifting statute, a prevailing party is entitled to a reasonable attorney's fee. This Court has adopted a presumption that the fee award should generally be based on the lodestar amount: a reasonable hourly rate times the number of hours reasonably expended on the case. Although the Court in *Delaware Valley II* considered whether the lodestar may be enhanced to reflect the risk of loss, the opinions in that case leave the issue unsettled.

We submit that no such enhancements should be permitted. Neither the statutory language nor the limited legislative history indicates that Congress intended to permit them. The lodestar amount represents, by definition, a "reasonable fee" for services rendered, and the statute makes no provision for other types of charges, to create still greater inducements for counsel to bring such actions. Indeed, since such awards serve to subsidize counsel for unsuccessful litigation, they are inconsistent with the statu-

[1] Issues concerning the merits of the litigation are accordingly not before this Court, and we express no views as to those issues.

tory directive that fee awards be made only to prevailing parties.

Judicial attempts to formulate practical standards to identify the circumstances in which a contingency enhancement would be appropriate and to provide guidance to the district courts concerning the methods for calculating such awards have not been successful, and there is no persuasive evidence that such awards are necessary to serve the purposes of fee-shifting statutes by assuring the availability of competent counsel to litigate meritorious cases. If Congress nevertheless concludes as a matter of policy that contingency enhancements are an appropriate part of a reasonable attorney's fee, it is free to so specify, and to provide standards for their assessment. In the absence of such congressional guidance, the statutory authority to award a reasonable attorney's fee should not be interpreted to include the authority to use a contingency enhancement in calculating that fee.

ARGUMENT

STATUTES REQUIRING REASONABLE ATTORNEY'S FEES TO BE PAID TO A PREVAILING PARTY DO NOT AUTHORIZE THE AWARD OF CONTINGENCY FEE ENHANCEMENTS OVER AND ABOVE THE LODESTAR

A. This Court Has Established A Presumption That The Lodestar Represents a Reasonable Fee

1. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 (1975), reaffirmed the "American Rule" requiring each litigating party to pay its own attorney's fees; fee-shifting is generally not permitted in the absence of an express statutory provision authorizing it. See *Hensley* v. *Eckerhart*,

461 U.S. 424, 429 (1983).[2] But Congress has often provided such authorization, to encourage citizens to vindicate important public rights (*e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 36 (1970) (fee-shifting under Clean Air Act)), or to ensure effective access to the judicial process for persons who might not otherwise be able to obtain legal counsel (*e.g.*, H.R. Rep. No. 1558, (94th Cong., 2d Sess. 1 (1976) (fee-shifting under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988)). See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560, 565 (1986) (*Delaware Valley I*); *Hensley*, 461 U.S. at 429.

Congress has accordingly authorized courts to award attorney's fees in litigation arising under a wide variety of statutes. See *Alyeska*, 421 U.S. at 260-262 & n.33.[3] The statutory language of these provisions typically authorizes the court to award "reasonable attorney's fees" to the "prevailing" or

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[2] Absent statutory authorization, there are three limited situations in which fee-shifting is permitted notwithstanding the American Rule. Courts may use their equitable powers to award fees under the common fund, common benefit, and bad faith exceptions to the no-fee rule. *Alyeska*, 421 U.S. at 257-260; *Pennsylvania* v. *Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986) (*Delaware Valley I*). None of these exceptions is at issue in the present case.

[3] These statutes include, *inter alia*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988; the Clean Air Act, 42 U.S.C. 7413(b), 7604(d), 7607(f), 7622(b)(2)(B); the Consumer Product Safety Act, 15 U.S.C. 2060(c), 2060(f), 2072(a), 2073; the Truth in Lending Act, 15 U.S.C. 1640(a); the Clayton Act, 15 U.S.C. 15; the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a)(2) and (d)(2), 26; the Copyright Act, 17 U.S.C. 505; and the Trademark Act, 15 U.S.C. 1117.

"substantially prevailing" party.[4] Thus, faced with a fee request under a fee-shifting statute, a court must determine whether the party has "substantially prevail[ed]," and if so, what fee amount is "reasonable."

2. The language of the standard fee-shifting provisions provides no real guidance as to what is "reasonable" or what it means to be "substantially prevailing." The legislative histories of most fee-shifting statutes are likewise silent on these questions. Congress did, however, briefly address these issues in enacting the attorney's fee provision of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988 (Section 1988).[5] There, Congress stated that "fees [should be] adequate to attract competent counsel, but [should] not produce windfalls to attorneys." S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). See also H.R. Rep. No. 1158, 94th Cong., 2d Sess. 9 (1976) (same). The Committee Reports cite *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), as listing the factors to be considered in fixing a fee award.[6] H.R. Rep. No. 1558, *supra*, at 8; S. Rep. No. 1011, *supra*, at 6.[7]

3. In its decisions since *Alyeska* and the enactment of Section 1988, this Court has gradually refined and clarified the standards for awarding attorney's fees. See *Delaware Valley I*, 478 U.S. at 561-566 (describing the Court's evolving views on "reasonable" attorney's fees).[8] As the Court observed in

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[4] See, *e.g.*, Clean Water Act § 505(d), 33 U.S.C. 1365(d) ("The court * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."); Solid Waste Disposal Act § 7002(e), 42 U.S.C. 6972(e) (identical provision); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ("the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

[5] In *Hensley*, 461 U.S. at 433 n.7, the Court observed that the standards for determining "reasonable" fees under Section 1988 apply equally to other federal statutes awarding such fees.

[6] The *Johnson* factors are (488 F.2d at 717-719):

> (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The "undesirability" of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.

[7] In addition, the Senate Report cites three district court decisions as examples of the correct application of the *Johnson* standards in setting a fee award. S. Rep. No. 1011, *supra*, quoted in *Hensley* v. *Eckerhart*, 461 U.S. at 430 n.4. See discussion *infra* at 24-25.

[8] With respect to the requirement that the party seeking fees "prevail[]" or "substantially prevail[]," the Court has held that while a party cannot be considered "prevailing" unless he or she receives "at least some relief on the merits of his claim," *Hewitt* v. *Helms*, 482 U.S. 755, 759-760 (1987), substantial success is not required. If a party succeeds on "'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. 782, 791-792 (1989) (quoting *Nadeau* v. *Helgemoe*,

that case (*id.* at 563), the *Johnson* factors actually provide little guidance to district courts: "[s]etting attorney's fees by reference to a series of sometimes subjective factors placed unlimited discretion in trial judges and produced disparate results."

a. The Court first addressed the question of what constitutes a "reasonable" fee in *Hensley*. The Court identified the "lodestar"—a reasonable number of hours multiplied by a reasonable hourly rate—as the "most useful starting point" for determining the amount of fees. 461 U.S. at 433. While the Court indicated that the lodestar could be adjusted upward or downward on the basis of other considerations, including the "results obtained" and other *Johnson* factors, it noted that many of the *Johnson* factors are subsumed within the lodestar calculation. *Id.* at 434 & n.9.[9]

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581 F.2d 275, 278-279 (1st Cir. 1978)). But meeting this standard gets plaintiff only across the threshold; the court must still determine what fee is reasonable under the circumstances.

[9] With respect to adjustment for the "results obtained," the Court observed (461 U.S. at 435-436) that:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended * * *, and indeed in some cases of exceptional success an enhanced award may be justified. * * *
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the [lodestar] may be an excessive amount. * * *

The Court acknowledged that it was providing only limited guidance in this regard: "There is no precise rule or formula for making these determinations" (461 U.S. at 436), but the court's exercise of its discretion must take account of these considerations. *Id.* at 436-437.

In *Blum* v. *Stenson*, 465 U.S. 886 (1984), the next case to address the issue, the Court placed added emphasis on the lodestar. It announced that the lodestar amount is "presumed to be the reasonable fee," *id.* at 897, and limited the use of the *Johnson* factors. As subsequently explained in *Delaware Valley I* (478 U.S. at 565), the Court in *Blum*

> specifically held * * * that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award.

Blum specifically left open the question of whether enhancement of the lodestar to compensate for the risk of not prevailing is ever permissible. 465 U.S. at 901 n.17.[10]

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[10] The Court has also considered the significance of a contingent fee arrangement between the prevailing party and his lawyer in the calculation of a fee award. It concluded that a plaintiff may make any appropriate contingency fee arrangements he chooses with his attorney to govern the damages to be recovered in his suit, notwithstanding the availability of statutory fees; such arrangements will not prejudice the fee award. In *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989), the Court held that "a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees." As the Court further explained in *Venegas* v. *Mitchell*, 495 U.S. 82, 90 (1990):

> § 1988 controls what the losing defendant must pay [to the plaintiff], not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the "reasonable attor-

b. In *Delaware Valley II*, the Court first addressed the precise issue presented in this case—whether the typical fee-shifting statute permits the award of a contingency enhancement to compensate the plaintiff (or more precisely his lawyer) for assuming the risk of not prevailing, and of thus receiving no fee award. The Court there reversed an award of a 100% contingency enhancement, but could not reach agreement on the issues of whether and when a contingency enhancement may be allowed under fee shifting statutes. Justice White, writing for a plurality of four Justices, concluded that "enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes" (483 U.S. at 727). But even if enhancement were ever permitted, the plurality found that the facts at issue did not justify such an award, which "should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728 (citing *Blum* v. *Stenson*, 465 U.S. at 898-901). Justice Blackmun, in a dissent joined by three other Justices, took the opposite view, asserting that "[a]n adjustment for contingency is necessary if statutory fees are to be competitive with the private market" (*id.* at 740).

Justice O'Connor, in a separate concurrence, joined in the plurality's judgment that a contingency enhancement was not justified in the case before the

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ney's fee" that a defendant must pay pursuant to a court order.

In reaching this conclusion, the Court observed in passing that "in construing § 1988, we have generally turned away from the contingent-fee model to the lodestar model" (495 U.S. at 87).

Court (483 U.S. at 731). But she also agreed with the dissent that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under [typical] fee-shifting provisions" (*ibid.*). Emphasizing that "compensation for contingency must be based on the difference in [the] market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case" (*ibid.*), she observed that courts "should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market" (*id.* at 733). Nevertheless, she also agreed with the plurality's conclusion that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market,'" *ibid.* (quoting plurality opinion at 731).[11]

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[11] The courts of appeals have sought to apply *Delaware Valley II* in numerous cases under the various federal fee-shifting statutes when prevailing plaintiffs have sought contingency enhancements. See, *e.g.*, *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), overruled by *King* v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991); *Rode* v. *Dellarciprete*, 892 F.2d 1177, 1184-1185 (3d Cir. 1990); *Student Pub. Interest Research Group* v. *AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Blum* v. *Witco Chem. Corp.*, 829 F.2d 367, 379-382 (3d Cir. 1987); *Craig* v. *Secretary, HHS*, 864 F.2d 324, 327-328 (4th Cir. 1989); *Spell* v. *McDaniel*, 824 F.2d 1380, 1403-1405 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988); *Leroy* v. *City of Houston*, 831 F.2d 576, 583-584 (5th Cir. 1987), cert. denied, 486 U.S. 1008 (1988); *Skelton* v. *General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988); *Hendrickson* v. *Branstad*, 934 F.2d 158, 162-163 (8th Cir. 1991); *D'Emanuele* v. *Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990); *Fadhl* v. *City of San Francisco*, 859 F.2d 649, 650-651 (9th Cir. 1988); *Smith* v. *Freeman*,

B. The Statutory Language Should Not Be Interpreted To Authorize The Award of Enhancements Because The Lodestar Establishes The Reasonable Attorney's Fee Necessary To Compensate A Prevailing Party

Although this Court has previously established a presumption that the lodestar amount is fully compensatory, we submit that it is now appropriate for this Court further to hold that this presumption is conclusive, because the lodestar is the definitive measure of "reasonable" attorney's fees authorized by the statutory language.[12] No upward adjustments to the lodestar should be permitted, and downward adjustments should be made where the prevailing

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921 F.2d 1120, 1122-1123 (10th Cir. 1990); *Wulf* v. *City of Witchita*, 883 F.2d 842, 876 (10th Cir. 1989); *Norman* v. *Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988).

Most of these decisions have assumed that Justice O'Connor's concurrence states the controlling rule, and have followed her view that contingency fee enhancement may be allowed in certain limited circumstances. See, *e.g.*, *Fadhl* v. *City of San Francisco*, 859 F.2d 649, 650 n.1 (9th Cir. 1988); *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). But in *King* v. *Palmer*, 950 F.2d 771 (1991), the D.C. Circuit, sitting en banc, reconsidered its *McKenzie* interpretation of *Delaware Valley II*. Like the Second Circuit in this case (Pet. App. 36), the D.C. Circuit in *King* concluded that the opinions in *Delaware Valley II* involve "three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices" (950 F.2d at 782). In the absence of a controlling opinion of this Court, the D.C. Circuit determined that "the appropriate course is to hold that contingency enhancements will not be available in this Circuit." 950 F.2d at 784.

[12] The court below correctly noted (Pet. App. 34-35) that this Court's rulings have already established that all the *Johnson* factors except contingency enhancements are subsumed in the lodestar. See *Blum*, 465 U.S. at 898-900; *Delaware Valley I*, 478 U.S. at 565.

party is only partially successful. This interpretation best conforms to the statutory language, minimizes unnecessary litigation, and produces predictable, fair results and is consistent with the legislative history.[13]

1. *Contingency Enhancements Conflict With The Statutory Language By Improperly Compensating Persons Who Were Not "Prevailing Parties"*

Enhancing fees to compensate for risk of loss requires the losing party to compensate the prevailing party for both the successful claim and for other, unsuccessful claims in other lawsuits. Since the typical fee-shifting statute provides that only "prevailing parties" are entitled to fees, this result is inconsistent with the scheme established by Congress.

Courts and commentators have traditionally viewed contingency multipliers as compensating the attorney for bearing an appreciable risk of nonpayment as a result of lack of success on the merits. Under this view, because the lodestar is calculated on the basis of a reasonable hourly rate for litigation in which the attorney is paid regardless of the outcome, additional compensation is thought to be necessary in order to induce attorneys to take on a case in which there is a chance they will receive no fee. See, *e.g.*, *Delaware Valley II*, 483 U.S. at 737 (dissenting opinion) ("[T]he market-based fee or hourly rate that is contingent on success is necessarily higher than the hourly rate charged when payment is current and certain. This fee enhancement ensures that

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[13] Although there may be disagreements as to the market rate or the reasonableness of the total number of hours claimed by the prevailing party, these are basic factual determinations that do not present any fundamental conceptual difficulties.

accepting cases on a contingent basis remains an economically attractive and feasible enterprise for lawyers."). Accord *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *Copeland* v. *Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980); *Jones* v. *Diamond*, 636 F.2d 1364, 1382 (5th Cir.), cert. granted, 452 U.S. 959, dismissed by agreement, 453 U.S. 950 (1981); Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U.Pa. L. Rev. 281, 324-326 (1977).

In effect, contingency awards compensate attorneys for their unsuccessful efforts. As the court stated in *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 685 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978):

> From the attorneys' standpoint, the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. Its use allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since over the long run, substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients.

That is precisely why contingency awards are inconsistent with statutory provisions allowing fees only to prevailing parties. See, *e.g.*, *Murray* v. *Weinberger*, 741 F.2d 1423, 1431 (D.C. Cir. 1984); ("Awarding an upward adjustment to the lodestar for the risk of losing and the concomitant risk of not obtaining an award of attorney's fees is not unlike compensating an attorney for unsuccessful claims; it

hedges the statute's requirement that only prevailing parties may recover attorney's fees."); cf. *Delaware Valley II*, 483 U.S. at 724-725 (plurality opinion); *McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984); *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4, 27 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985).[14]

The rationale for contingency multipliers as expressed in *Stanford Daily* is inconsistent with the Court's decision in *Hensley* v. *Eckerhart*, *supra*. See *Laffey*, 746 F.2d at 27; *Murray*, 741 F.2d at 1431. The award of a contingency multiplier in effect compensates a prevailing party's counsel for the risk that he might have lost the case and, thus, subsidizes counsel for unsuccessful litigation.[15] But the Court held

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[14] There is direct evidence that Congress did not intend fee-shifting statutes to operate in this fashion. During the House hearings on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, Representative Sieberling stated:

> [S]ome people may conclude that the [fee provision is] intended to promote the special interests of lawyers. Perhaps that is so to the extent it promotes the interests of successful lawyers who make the right judgment or who handle the case properly so that they win.
>
> But it certainly is not calculated to promote the interests of lawyers who make the wrong judgment * * *.

Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 8 (1975). See also *Ruckelshaus* v. *Sierra Club*, 463 U.S. 681, 692-693 & n.13 (1983) ("central purpose" of § 304(d) of Clean Air Act (42 U.S.C. 7604(d)) was to "check the 'multiplicity of [potentially meritless] suits'").

[15] For example, if the chance of success in a particular case in which a party actually prevails were adjudged (with hindsight) to have been 50 percent at the time the complaint was

in *Hensley* (461 U.S. at 434-436) that Congress did not intend to saddle a losing defendant with attorney's fees incurred by a partially successful plaintiff in the pursuit of discrete claims on which the plaintiff did not prevail. *A fortiori*, it did not intend to require a defendant to pay the attorney's fees of a totally unrelated plaintiff whom the defendant has not harmed in any way. Accord *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 691-692 (prohibition of fee awards to nonprevailing parties).

In sum, enhancing fees to compensate for risk of loss "is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees." *Delaware Valley II*, 483 U.S. at 725 (plurality opinion).

2. *Contingency Enhancements Are Not Necessary To Ensure That Parties Will Be Able To Obtain Representation*

The purpose of fee-shifting statutes is to encourage and enable private parties to obtain counsel. See, *e.g.*, *Delaware Valley II*, 483 U.S. at 725 (plurality opinion). Awards limited to the lodestar amount fully satisfy that purpose, however. Potential for reimbursement will cause many persons who would not otherwise be willing to file suit to advance fees to their lawyers in anticipation of a fee award at the conclusion of the litigation.

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filed, a risk multiplier of two might be employed. Assuming the risk assessment were accurate, it could be expected that counsel would succeed in one out of every two similar cases filed. The effect of doubling counsel's fee recovery for prevailing in the first case is indistinguishable from paying for the time counsel devotes to its hypothetical unsuccessful twin.

Even plaintiffs financially unable to make such advances will nevertheless still be able to retain counsel under the lodestar interpretation. Contingent fee representation would still be available in cases where the potential for damages provides a source of fees, since the normal market for contingency operates. See, *e.g.*, *Blanchard*, 489 U.S. at 87; *Venegas* v. *Mitchell*, 495 U.S. at 82. Similarly, contingency enhancements would also be unnecessary where the defendant's liability is clear, because in those cases some fee award is virtually certain and counsel would have adequate incentive to take the case in expectation of future payment. See *Texas State Teachers Ass'n* v. *Garland Independent School District*, 489 U.S. at 791-792.[16] Thus, the only cases where contingency enhancements might be necessary to attract competent counsel to represent plaintiffs who are unable to pay fees are cases where liability is uncertain and damages are not a possibility.

Even in this limited class of cases, we submit that a contingency enhancement over the lodestar is not necessary to enable a plaintiff with a case involving a fair chance of success to obtain competent counsel.[17]

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[16] This is often the case under federal environmental statutes. Under the Clean Water Act, for instance, sources are subject to strict numerical limitations on their discharges, and are required to monitor and report their discharge levels. See Clean Water Act §§ 301, 308, 402, 33 U.S.C. 1311, 1318, 1342. In a suit to enforce these provisions, the discharge monitoring reports provide virtually irrefutable evidence of liability. *Sierra Club* v. *Union Oil Co.*, 813 F.2d 1480, 1491-1492 (9th Cir. 1987), remanded on other grounds, 485 U.S. 931 (1988); *Public Interest Research Group* v. *Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 68 (3d Cir. 1990), cert. denied, 111 S. Ct. 1018 (1991).

As the plurality opinion in *Delaware Valley II* observed (483 U.S. at 726-727):

> [fee enhancement for risk is unnecessary] in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer. It is also unlikely to be [necessary] in any market where there are competent lawyers whose time is not fully occupied by other matters.
>
> * * * * *
>
> It may be that without the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond that the goal of the fee-shifting statutes will not be achieved.

This analysis is confirmed by the fact that such cases continue to be brought, although it does not appear that contingency enhancements have been so generally awarded that counsel in any particular case can reasonably base the decision to accept the case on the expectation of such an award. See H. Newberg, *Attorney Fee Awards* § 31.01 (1986 & Supp. 1991) (listing cases in which multipliers allowed after *Blum*).

3. *The Test Of The* Delaware Valley II *Concurrence Has Proven To Be Unworkable*

Justice O'Connor's concurrence, which has been generally accepted as the holding of *Delaware Valley II* (note 11, *supra*), requires a two-step analysis:

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[17] We do not believe that it is consistent with the purposes of these statutes to encourage the bringing of truly marginal cases. See note 18, *infra*.

the court must consider first, how the relevant market compensates for contingency, and second, whether the fee applicant would have faced "substantial difficulties" in attracting counsel to handle the case without the prospect of enhancement. *Delaware Valley II*, 483 U.S. at 733. Experience now demonstrates that there are serious practical difficulties with both steps.

a. The "market based" inquiry is designed to avoid the serious theoretical and practical objections to basing a contingency enhancement on an assessment of the risk of prevailing in the particular case in which the fee is sought.[18] But this approach itself creates another difficulty: the identification of the relevant market. As the concurrence recognized, "[i]n most fee-shifting cases * * * the private market model of contingency compensation will provide very

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[18] That approach was eschewed by all nine Justices in *Delaware Valley II* (483 U.S. at 719-723 (plurality opinion), 731 (concurring), 745-746 (dissenting). The plurality opinion summarized the objections to it. Under an "individual riskiness" regime, the riskier the case, the greater the "need" for enhancement. This penalizes the losing parties with the strongest and most reasonable defenses, "creating a perverse penalty for those least culpable." 483 U.S. at 719. In addition, "[e]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case" (*id.* at 721-722); it is inherently difficult and unreliable to require a court to estimate retroactively the prevailing party's chances of success in order to calculate the proper amount of enhancement (*id.* at 722); "because the contingency bonus cannot be determined with either certainty or accuracy, it 'cannot be justified on the ground that it provides an appropriate incentive for litigation'" (*ibid.*); and individualized contingency fee enhancement further complicates the already protracted and complex task of setting fees under the fee-shifting statutes (*id.* at 483-484).

little guidance." 483 U.S. at 731 (citing *City of Riverside* v. *Rivera*, 477 U.S. 561, 573-576 (1986)).[19] Considering the relevant market to be comprised of cases concerning similar subject matter—for example discrimination cases for Title VII awards, and environmental cases for SWDA and Clean Water Act awards—does not resolve the difficulty. In these areas, and for many, if not most, fee-shifting statutes, there does not appear to be a significant comparable private market (*i.e.*, one in which a prevailing party may not recover under a fee shifting provision).

Where a fee shifting statute assures that the prevailing party's fee will be paid by his opponent, there is no market incentive to control the size of the fee; instead, judicial awards determine the amount of any fee award. Thus, if fee enhancements are routinely awarded, attorneys can be expected to seek (and their

[19] Contingency fees are typically used in private tort law, where the fee is paid out of the successful plaintiff's damage award. In that context, it is at least roughly equitable to tie the attorney's fee to the size of the damage award obtained through his efforts. But many statutes with fee-shifting provisions—including the SWDA and the Clean Water Act—do not allow plaintiffs to recover monetary damage awards from defendants. Under the Clean Water Act and SWDA, only three forms of relief are available to private plaintiffs—injunctions, civil penalties payable to the United States Treasury, and litigation costs. 33 U.S.C. 1365(a) and (d) (Clean Water Act); 42 U.S.C. 6972(a) and (e) (SWDA). See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). Similarly, as *Riverside* demonstrates, many Title VII cases produce little or no monetary recovery, and therefore do not provide a basis for percentage-based contingency fees. The rationale applicable to the situation in which the fee is paid out of the recovery obtained by the plaintiff is simply inapplicable where there is no such fund, and the award is paid directly by the defendant.

clients will have no reason to oppose) fee agreements that include contingency enhancements, and ultimately to decline to accept cases under fee-shifting statutes on any lesser basis. Judicial determinations of how the "market" compensates for contingency would then have become a self-fulfilling prophecy, rather than any true indication that enhancement is in fact necessary to attract competent counsel.

b. As the court in *King* v. *Palmer* recognized (950 F.2d at 779-780), the "substantial difficulties" aspect of the concurrence's test is also problematic. The court first concluded that both the *Delaware Valley II* concurrence and the plurality "envisioned a particularized factual inquiry into the plaintiff's *actual* difficulties in retaining counsel." *Id.* at 778.[20] It then identified three critical problems with the substantial difficulties test. First, "focusing on actual difficulties will encourage 'a charade in which clients seeking representation under fee shifting statutes would be steered to several attorneys whose prearranged role it would be to "refuse" the case, knowing that such refusals were necessary to permit the eventual award of fees.'" *Id.* at 780. Second, em-

[20] The *King* court correctly concluded (950 F.2d at 779 that self-serving, *post hoc* affidavits by counsel, who had never been approached by plaintiff, that they would not take cases like hers without a contingency enhancement were insufficient to meet the "substantial difficulties" test. Cf. *Department of Labor* v. *Triplett*, 494 U.S. 715, 723-724 (1990) (rejecting "anecdotal evidence" in the form of attorney affidavits asserting the inadequacy of available attorney fees). But see *Norman* v. *Housing Authority*, 836 F.2d 1292 (11th Cir. 1988) (proper to rely on such affidavits); cf. *Blum* v. *Witco Chemical Corp.*, 829 F.2d 367, 381 (3d Cir. 1987) (suggesting appointment of special master to consider comments of bar and litigants, and make findings regarding need for contingency enhancements).

phasizing the actual difficulties will "create perverse incentives" by discouraging reference services that make it easier for litigants to find legal representation. *Ibid.*

Third, the court recognized the close relation between the difficulty in obtaining counsel and the merits of the claim to be asserted. 950 F.2d at 780. Risk of loss is surely the principal reason a lawyer will turn down a case under a fee-shifting statute. Yet under both the plurality and concurring opinions in *Delaware Valley II*, the risk of loss in a particular case is not a factor that courts may look at in determining whether a contingency enhancement is appropriate. 483 U.S. at 724 (concurring opinion); *id.* at 726-727 (plurality opinion); see also *id.* at 745-746 (dissenting opinion, noting that contingency enhancement not designed primarily to reflect risk of loss in particular case). In other words, the "substantial difficulties" test largely measures the "riskiness" of the case—precisely the factor that both the plurality and the concurrence in *Delaware Valley II* agree may *not* be considered.[21] Faced with these problems, the *King* court correctly concluded that the "substantial difficulties" test is unworkable (950 F.2d at 780):

> The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial because, by

[21] As the *King* court observed (950 F.2d at 780): "[i]f the courts cannot [consider legal risk] directly, how can it be appropriate to do so vicariously through the eyes of the lawyers who declined the case?"

> definition, the plaintiff stands before the court with counsel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question years later, our inquiry is circular.

4. *The Legislative History Of Section 1988 Does Not Support The Lower Court's Conclusion That Contingency Fee Enhancements Were Authorized By Congress*

Despite the absence of any statutory language indicating that contingency fee enhancements may be added to lodestar fees that are otherwise reasonable, it has been suggested (*Delaware Valley II*, 483 U.S. at 738-739 (dissenting opinion)) that the legislative history of Section 1988 nevertheless requires this interpretation. A fair reading of *Johnson* and the three cases cited in the Senate Report on Section 1988, however, does not support the conclusion that Congress intended contingency multipliers to be an element of "reasonable" attorney's fees.

Although the *Johnson* factors include consideration of "[w]hether the fee is fixed or contingent" (488 F.2d at 718), "a careful reading of *Johnson* shows that the contingency factor was meant to focus judicial scrutiny solely on the existence of any contract for attorney's fees which may have been executed between the party and his attorney." *Delaware Valley II*, 483 U.S. at 723 (plurality opinion). Accord Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 479 n.38 (1981). Apparently, therefore, the Fifth Circuit meant only that the nature of the parties' fee arrangements should be taken into account in determining the reasonableness of a particular fee award; "there is nothing in *Johnson* to show that this factor was meant to reflect the contingent nature of prevailing in the lawsuit as

a whole." *Delaware Valley II*, 483 U.S. at 723 (plurality opinion).[22]

The cases cited with approval in S. Rep. No. 1011, *supra*, confirm this analysis. No bonus of any kind was awarded in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975). There, the court simply reviewed nine factors, similar to those listed in *Johnson*, and *reduced* the prevailing party's fee request by roughly 15%. In *Davis* v. *County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. 1974), the district court added a "Result Charge" to the basic award for "Attorneys' Time" at the "normal hourly rates." As the label used suggests, the fee was enhanced not as compensation for the risk of nonpayment due to failure on the merits, but because the court believed that counsel had "achieved excellent results" and that "[t]he nature of the case made it difficult to litigate" (8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048). In *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 688 (N.D. Cal. 1974), the district court did consider the contingency factor. It ruled that "the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant[ed] increasing the base fees figure (hours worked times average billing rate)."[23] The *Stanford Daily* court's

[22] Moreover, this Court has rejected the position that each separately listed *Johnson* factor identifies an appropriate enhancement to the lodestar. *Blum* v. *Stenson*, 465 U.S. at 898-899; *Delaware Valley I*, 478 U.S. at 564, 566. Accord *King* v. *Palmer*, 950 F.2d at 784 n.8.

[23] Although the district court did not explain how it had translated these factors into a specific dollar amount, it emphasized that the various *Johnson* factors overlap and that "recognition of their overlap [is needed to avoid] unnecessary inflation of the attorneys' fees award" (64 F.R.D. at 682).

approach was thus consistent with the one used in *Johnson*; it evaluated whether the base fee adequately reflected not only the contingent nature of the compensation, but also the quality of the work product and the results obtained. In *Blum*, the Court recognized that the latter two factors—like those relied on in *Davis*—are subsumed within a properly calculated lodestar fee. 465 U.S. at 898-900. The citation to *Stanford Daily* in the Senate Report does not require that the "contingency" factor is to be treated any differently.

As the plurality of this Court concluded in *Delaware Valley II*, 483 U.S. at 724, "[g]iven the divergence in both analysis and result between these three cases, the legislative history is, at best, inconclusive in determining whether Congress endorsed the concept of increasing the lodestar amount to reflect the risk of not prevailing on the merits." There is accordingly no basis to depart from the interpretation most consistent with the language of the statute.

CONCLUSION

In light of the serious practical and theoretical difficulties inherent in determining whether a contingency enhancement of the lodestar fee may be appropriate in a particular case or in a class of cases, we submit that the statutory directive to award a "reasonable" fee to a prevailing party should not be interpreted as a congressional authorization to include such enhancements. The determination of when, if at all, such an enhancement is appropriate involves questions of policy for Congress, which is better equipped than the judiciary to develop systematic, equitable rules to govern the award of such enhancements without providing windfalls. *King* v. *Palmer*, 906 F.2d 762, 770 (1990) (Williams, J., dissenting),

rev'd, 950 F.2d 771 (D.C. Cir. 1991) (en banc). Accordingly, in the absence of definitive direction from Congress, upward adjustments to the lodestar to compensate for the contingency of loss should not be allowed.[24] The judgment of the court of appeals should accordingly be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ANNE S. ALMY
MARK R. HAAG
Attorneys

MARCH 1992

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[24] The absence of express congressional authorization for contingency enhancements is particularly important where the fee-paying defendant is a governmental entity. Fee shifting statutes represent a limited waiver of sovereign immunity. *Ruckelshaus* v. *Sierra Club*, 463 U.S. at 685-686. Waivers of immunity must be strictly construed and may not be "enlarge[d] * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927); *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). Accordingly, in determining whether a "reasonable" attorney's fee award may properly include a contingency enhancement, the court should be guided by the statutory language and by what Congress "clearly and unequivocally" intended. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).

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Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON,
Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA AND SEVERAL OF THE STATES, IN SUPPORT OF REVERSAL

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel
Counsel of Record

Counsel for the District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

[Additional Counsel Listed in Brief]

JAMES H. EVANS
Attorney General of Alabama
11 South Union Street
Montgomery, Alabama
36130
(205) 242-7300

DANIEL E. LUNGREN
Attorney General of California
1515 K Street, Suite 600
Sacramento, California
94244-2550
(916) 324-5157

ROBERT A. BUTTERWORTH
Attorney General of Florida
Department of Legal Affairs
The Capitol
Tallahassee, Florida
32399-1050
(904) 487-1963

ROLAND W. BURRIS
Attorney General of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6217

ROBERT T. STEPHAN
Attorney General of Kansas
2nd Floor
Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215

SCOTT HARSHBARGER
Attorney General of
Massachusetts
1 Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

SUSAN B. LOVING
Attorney General of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania
17120
(717) 787-3391

MARK W. BARNETT
Attorney General of
Sourth Dakota
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
(605) 773-3215

PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JAMES E. DOYLE
Attorney General of Wisconsin
123 West Washington Avenue
Madison, Wisconsin
53707-7857
(608) 226-9945

TABLE OF CONTENTS

	Page
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. THE TYPICAL FEE-SHIFTING STATUTE SHOULD NOT BE INTERPRETED TO PERMIT PREVAILING PLAINTIFFS TO SECURE AN AWARD OF FEES BEYOND THE LODESTAR IN ORDER TO COMPENSATE THEIR COUNSEL FOR RISK OF LOSS.	6
A. Prevailing Plaintiffs and the Lodestar Award.	6
B. The Legislative History.	12
C. Reasonable Client-Paid Fees and Reasonable Fee-Shifting Awards.	14
II. THE EVIDENCE IN *DAGUE*, AS IS TYPICAL IN CASES ATTEMPTING TO APPLY *DELAWARE VALLEY II*, IS WOEFULLY INADEQUATE TO ESTABLISH THAT RISK ENHANCEMENT IS NECESSARY TO ENSURE THAT PERSONS WITH MERITORIOUS CLAIMS UNDER FEDERAL FEE-SHIFTING LEGISLATION SECURE COUNSEL.	15
A. *Dague*.	18
B. *McKenzie & King*	21
III. RULES GOVERNING AN AWARD OF FEES TO COMPENSATE COUNSEL FOR RISK OF LOSS ARE POLITICAL JUDGMENTS TO INTERVENE IN THE MARKET WHICH SHOULD BE MADE BY CONGRESS.	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Blanchard v. Bergeron, 489 U.S. 87 (1989) 7, 12, 13, 14, 15

Blum v. Stenson, 465 U.S. 886 (1984) 7, 12, 13

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 9

City of Burlington v. Dague, 935 F.2d 1343 (2d Cir. 1990), *cert. granted*, No. 91-810 . . . . . *passim*

Department of Labor v. Triplett, 494 U.S. 715 (1990) 17, 21

Hensley v. Eckerhart, 461 U.S. 424 (1983) 7, 8, 9

Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) 6, 7, 8, 9

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 12, 13

King v. Palmer, 906 F.2d 762 (D.C. Cir. 1990), *vacated*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *petition for a writ of certiorari pending*, No. 91-1370 . . . . . *passim*

Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) 8, 9

Library of Congress v. Shaw, 478 U.S. 310 (1986) 20

McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir.), *reh'g denied en banc*, 884 F.2d 1405 (D.C. Cir. 1989) . . . . . *passim*

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1987) 6, 7, 13

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) . . . . . *passim*

Pierce v. Underwood, 487 U.S. 552 (1988) 10

Riverside v. Rivera, 477 U.S. 561 (1986) 15

Save Our Cumberland Mountains v. Hodel, Inc., 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) 8

Venegas v. Mitchell, 110 S. Ct. 1679 (1990) 14

TABLE OF AUTHORITIES (continued)

Page

STATUTES

Equal Access to Justice Act, 28 U.S.C. § 2412 10

Clean Water Act, 33 U.S.C. § 1251 *et seq.* 6

33 U.S.C. § 1365(d) 6

42 U.S.C. § 1988 . . . . . 6, 14

Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* 6

42 U.S.C. § 6972(e) 6

OTHER AUTHORITIES

H.R. Rep. No. 94-1558 (1976) 12

S. Rep. No. 94-1011 (1976) 12

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BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA AND SEVERAL OF THE STATES, IN SUPPORT OF REVERSAL

INTERESTS OF *AMICI CURIAE*

Amici are the District of Columbia and several of the States. These governments, as well as local governments within the States, are subject to numerous federal statutes that provide for an award of reasonable attorney's fees to prevailing plaintiffs. Increasingly under these statutes, prevailing plaintiffs have requested, and have been granted, fee awards in excess of lodestar fee awards — that is, awards in excess of the product of reasonable hourly rates charged by attorneys and the number of hours reasonably expended on the litigation. These additional awards are made in cases in which counsel for plaintiffs have agreed to represent their clients on a contingent-fee, or partial contingent-fee, basis. They purport to protect counsel against the risk of receiving

no fee, or a fee that does not fully reflect the value of the time expended on the case, should they lose. Such risk enhancements, which may equal already costly lodestar awards, have had a severe impact on the public fisc and on the ability of state and local governments to pursue litigation policies they believe will promote the public interest. Such undesirable effects are likely to become even greater, unless this Court rules that risk enhancement is not authorized by Congress in fee-shifting provisions that merely permit an award of a reasonable attorney's fee to a prevailing party.

As a consequence, *amici* urge this Court to reverse the decision of the Second Circuit in this case requiring the City of Burlington, Vermont, to pay a risk enhancement to counsel for plaintiffs who prevailed in litigation against it pursuant to two federal fee-shifting statutes. This Court should rule that a risk enhancement may never be awarded under the typical federal fee-shifting statute.

SUMMARY OF THE ARGUMENT

Congress has enacted more than 100 statutes that permit courts to award a reasonable attorney's fee to a prevailing party in litigation, including awards to prevailing plaintiffs against state and local governments. The language of such fee-shifting provisions should not be interpreted to permit lodestar awards to be enhanced simply because counsel for plaintiffs have agreed to represent them on a contingent-fee basis. Risk enhancement is, in effect, an award of fees for litigation in which plaintiffs have not prevailed, and it compels defendants to pay attorney's fees for time expended by plaintiffs' counsel in other cases in which defendants have prevailed.

Neither the purpose nor the legislative history of fee-shifting legislation supports such a result. Instead, as all but one of this Court's decisions have indicated, there is a strong presumption that a reasonable attorney's fee that may be

awarded against a defendant pursuant to the typical fee-shifting statute is a lodestar award, no more and no less. In addition, this Court has ruled that parties who defend such cases should not be required to pay fees for litigation that does not establish a violation of the law on their part. Finally, this Court has made plain that there is no necessary correlation between the reasonableness of fees that *a client* may agree to pay his counsel pursuant to a contingent-fee agreement and the reasonableness of fees that *a defendant* should be obliged to pay to plaintiff's counsel when a plaintiff prevails in a case.

In this Court's only decision addressing the propriety of risk enhancements under the typical fee-shifting statute, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), this Court denied a risk enhancement but in a sharply divided decision. A plurality adopted as an initial position that fee awards may never be enhanced to compensate for risk of loss because, *inter alia*, such enhancements compel defendants to pay fees for cases in which plaintiffs do not prevail and, if calculated on a case-by-case basis, would result in awards against defendants that vary inversely with the strength of the case against them. *Id.* at 724-27. The plurality's secondary position was that, if risk enhancement is permissible, such awards may be made only in exceptional cases in which plaintiffs faced a real risk of not prevailing and such awards may not be greater than one-third of the lodestar. *Id.* at 730.

Justice O'Connor, who concurred in part and in the judgment, refused to rule out the possibility of risk enhancement but agreed that any risk enhancement could not be based on a case-by-case assessment of the merits. *Id.* at 731, 734. Instead, she wrote, courts should examine the market to determine whether a risk enhancement is needed, and in what amount, and should make those determinations on a class-wide basis. *Id.* at 731-34.

Finally, the dissent, although agreeing that risk enhance-

ment should not be based on the likelihood of success in a particular case, would have permitted a risk enhancement in each and every case to the extent that plaintiffs' counsel were not able to mitigate the risk of loss by contractual arrangements with their clients. *Id.* at 747-49. In addition, the dissent would have permitted an extra risk enhancement in special circumstances. *Id.* at 751-52.

Amici believe that the experiences of the last five years under the *Delaware Valley II* regime demonstrate the correctness and wisdom of the initial position taken by the *Delaware Valley II* plurality — that risk enhancement of a lodestar fee award is improper. Those experiences have revealed that the approaches set forth in the plurality's secondary position, and in Justice O'Connor's concurring opinion, as well as in the across-the-board basic contingency enhancement advocated by the dissent, cannot be applied in a manner that results in a rational fee-shifting scheme — one that ensures that persons with meritorious claims, but modest means, secure counsel, but avoids windfalls to attorneys.

Some of the problems are illustrated by the case now under review. The risk enhancement award here is based on an assessment of the potential merits of the case, as they might have been perceived at the outset of the litigation; it is also based on factors, such as delay in payment and the complexity of the case, that are either separately compensable or included in the lodestar. These flaws, as well as others, are also illustrated by the risk enhancement rule adopted, and then rejected, by the United States Court of Appeals for the District of Columbia Circuit. In *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir.), *reh'g denied en banc*, 884 F.2d 1405 (D.C. Cir. 1989), and in *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990),[1] the court developed a rule that there should be a 100%

[1] For the convenience of the Court, the panel decision in *King* is reproduced in the appendix. App. 49A-67A.

enhancement of the lodestar in each and every case to the extent that it was contingent. This rule has now been rejected by the court sitting *en banc* in favor of a rule that risk enhancement is never permitted in the absence of express Congressional authorization. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *petition for a writ of certiorari pending*, No. 91-1370.[2]

Furthermore, assuming that it is proper for this Court to determine whether risk enhancement is needed, *Dague* and the decisions of the D.C. Circuit make plain that the evidence heretofore adduced is woefully insufficient to support a conclusion that risk enhancement is needed to ensure that persons with meritorious claims, but modest resources, can secure legal representation. Instead, the evidence merely establishes what some attorneys believe is a desirable level of compensation, as if the purpose of statutory fee-shifting were to ensure that attorneys replicate the returns they seek to achieve through private arrangements with clients.

Finally, the experiences of *amici* under the *Delaware Valley II* regime make two other matters plain. First, requests for risk enhancement call upon the judiciary to make legislative judgments that properly belong to Congress. Second, judicial awards of risk enhancement, rather than reflecting the market, artificially alter the market in a manner that produces windfalls for attorneys.[3]

[2] For the convenience of the Court, the *en banc* decision in *King* is reproduced in the appendix. App. 1A-48A.

[3] Citations to the appendix attached to this brief are designated as "App. —." Citations to the appendix to the petition for the writ of certiorari in *City of Burlington v. Dague* are designated "*Dague* Cert. Pet. App. —." Citations to the Petition for a Writ of Certiorari in *King v. Palmer*, No. 91-1370, are designated "*King* Cert. Pet. —."

ARGUMENT

I. THE TYPICAL FEE-SHIFTING STATUTE SHOULD NOT BE INTERPRETED TO PERMIT PREVAILING PLAINTIFFS TO SECURE AN AWARD OF FEES BEYOND THE LODESTAR IN ORDER TO COMPENSATE THEIR COUNSEL FOR RISK OF LOSS.

In enacting fee-shifting legislation, Congress intervened in the marketplace to encourage the vindication of selected federal rights. The issue in this case is the extent of Congress's intervention. In resolving this issue, "the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 764 n.4 (1989). When the competing rights that Congress established and the competing interests it normally takes into account are examined, *amici* believe that this Court must conclude that Congress authorized only lodestar awards to prevailing plaintiffs.

A. Prevailing Plaintiffs and the Lodestar Award.

The language of the typical federal fee-shifting provision, like the language of the fee-shifting provisions at issue in this case, merely permits courts to award a reasonable attorney's fee to a party who prevails in litigation.[4] Both

[4] The fee-shifting provisions at issue in this case are those contained in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq*. Both provisions permit a "reasonable attorney" fee to be awarded to the "prevailing or substantially prevailing party . . .." 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e). This Court has ruled that federal fee-shifting provisions containing this language, or language similar to it, should be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes, supra*, 491 U.S. at 758 n.2 (explaining that 42 U.S.C. § 1988 was patterned after the fee provision of Title VII and, as a consequence, they should ordinarily be "interpreted alike"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (fee-shifting provision of Clean Air Act should be interpreted like 42 U.S.C. § 1988, even though the Clean Air Act merely states that parties may secure fees and does not specify prevailing parties).

before and after *Delaware Valley II*, this Court has ruled that a lodestar award is presumptively a reasonable attorney's fee that may be imposed against an unsuccessful defendant under such fee-shifting provisions. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 94-95 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"); *Blum v. Stenson*, 465 U.S. 886, 898-901 (1984). A lodestar award, properly computed, compensates counsel for all time reasonably expended on a case at a reasonable hourly rate.

This Court has also made clear that fee-shifting statutes should be interpreted to minimize defense subsidies of unsuccessful litigation and that these statutes do not ordinarily permit fees to be awarded against parties for litigation that does not establish a violation of law on their part. Thus, in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), this Court ruled that a plaintiff who prevails on one claim in a case may not recover fees for time spent on distinct unsuccessful claims.

Furthermore, in *Independent Federation of Flight Attendants v. Zipes, supra*, this Court ruled that prevailing plaintiffs, or their counsel, may not recover their fees when fee-shifting would require a party to pay fees for litigation which did not establish that it engaged in wrongdoing. The issue in *Zipes* was whether an intervenor — there a union — in a Title VII case brought by employees against their employer could be held liable for lodestar fees incurred by prevailing plaintiffs in successfully meeting the union's arguments. This Court ruled that an intervenor may not ordinarily be held liable for such fees. Instead, an intervenor may be held liable only in those circumstances in which a plaintiff who loses may be held liable for a defendant's fees under a fee-shifting statute — only if its claims were "frivolous, unreasonable, or without foundation . . .." *Id.* at 766.

In so ruling, this Court assumed that the time spent by plaintiffs meeting the arguments of the intervening union, including arguments against liability, would not be compensated at all. *Id.* at 762. However, this fact had to be balanced against the fact that the intervenor had not been found

guilty of violating plaintiffs' rights. The Court stated: "Even less with regard to an innocent intervenor than with regard to an allegedly lawbreaking defendant would Congress have wished to 'distort' the adversary process . . . by giving the plaintiff a disproportionate advantage with regard to fee entitlement." *Id.* at 764. As this Court explained:

> . . . [N]othing in the statute gives . . . [prevailing plaintiffs] hegemony over all the other rights and equities that exist in the world. Here as elsewhere, the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account.

Id. at 764 n.4.

One of the rights that Congress has established in fee-shifting legislation is that a defendant who prevails in litigation brought pursuant to such legislation is not obliged to pay plaintiff's attorney's fees. Risk enhancement undermines this right. Risk enhancement is sought precisely because, in some cases, plaintiffs fail to establish wrongdoing by defendants. It is thus a defense-paid subsidy for unsuccessful litigation. As the plurality in *Delaware Valley II* explained:

> On a more fundamental level, . . . using the risk of loss to increase the lodestar figure compensates attorneys not only for their successful efforts in one case, but for their unsuccessful claims asserted in related cases. This not only "encourag[es] marginal litigation," but raises "the reasonable question of 'why the subsidy [for unsuccessful litigation] should come from the defendant in another case.'"

Delaware Valley II, *supra*, 483 U.S. at 719-20, *quoting Laffey v. Northwest Airlines, Inc.* 746 F.2d 4, 27 n.138 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).[5]

Hensley and *Zipes* thus strongly support the principle that a defendant, whom Congress has exonerated from liability

[5] *Laffey* was overruled in part in *Save Our Cumberland Mountains v. Hodel, Inc.*, 857 F.2d 1516 (D.C. Cir. 1988) *(en banc)*.

for plaintiff's attorney's fees in a case in which defendant prevails, should not then be obliged to subsidize this loss in another case by payment of a risk-enhanced award to a plaintiff who might have lost but who did not. If, under *Hensley*, a defendant need not pay even a lodestar award to a prevailing plaintiff for hours spent on distinct claims on which the plaintiff did not prevail, the "same logic" dictates that this defendant should not have to pay a risk enhancement to that plaintiff because in a different case, a plaintiff did not prevail. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d at 27.

Similarly, insofar as risk enhancement is concerned, a defendant, like the *Zipes* intervenor, is a party that is being asked to pay fees because of litigation which did not establish any wrongdoing on its part. Furthermore, defendants, in cases pursuant to federal fee-shifting statutes, are already disadvantaged with respect to fee entitlement, even without risk enhancement. Fee-shifting statutes essentially authorize one-way fee-shifting to prevailing plaintiffs because prevailing defendants, unlike prevailing plaintiffs, ordinarily may not recover their fees. For prevailing defendants to recover fees, they must demonstrate that plaintiffs' action was "frivolous, unreasonable, or without foundation . . .." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The conditions under which prevailing plaintiffs and prevailing defendants may receive lodestar fee awards thus sharply tilt the adversary process in favor of plaintiffs. To permit counsel for plaintiffs to receive enhanced fee awards because they *might* have lost that case, or *may* have lost others, would distort the adversary process even more and would confer on plaintiffs a disproportionate advantage in securing fee awards. See App. 67A (Williams, J., concurring).

The premise underlying requests by attorneys for a risk enhancement is that Congress, in altering the American Rule on fee-shifting to provide for an award of a reasonable attorney's fee to a prevailing party, must have intended to require defendants to pay an award reflecting the premium a private

client might agree to pay from the fruits of a successful lawsuit in exchange for free representation should the case be unsuccessful. Put another way, Congress must have intended to incorporate into fee-shifting the private-market model of contingent-fee contracts, but with defendants paying the bill rather than the client.

This premise overlooks the rights of defendants that Congress established in fee-shifting legislation as well as the interests of defendants that Congress normally would have taken into account. Court-ordered fee awards pursuant to the typical fee-shifting statute may run against the public, as they may whenever the United States, the District of Columbia, the States, or local governments are defendants. Furthermore, there are significant differences between attorney-client fee agreements and court-ordered fee awards.

Thus, when Congress has focused on the competing interests presented in cases against government, as it did in enacting the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, it has taken steps to protect the public fisc. Under the EAJA, a prevailing plaintiff may recover fees against the United States only if a court finds that the position of the United States was not substantially justified. Furthermore, the EAJA, which provides that fee awards "shall be based on market rates," (28 U.S.C. § 2412 (a)(2)(A)), also places a general cap on the hourly rate that may be charged. *See Pierce v. Underwood*, 487 U.S. 552 (1988). The EAJA does not, of course, impeach the validity of this Court's more generous lodestar approach under the typical fee-shifting statute. It is, however, evidence that the public fisc is one of the interests Congress normally considers in enacting fee-shifting statutes that impose obligations on government and that the interest of prevailing plaintiffs in recovering their attorney's fees is not always predominant.

In addition, in enacting fee-shifting legislation, Congress was cognizant of the traditional private contingent-fee arrangement, because it recognized that such arrangements, in some instances, did not offer incentives to attorneys to

take on cases having no prospect of a substantial damages award. In a case having such a prospect, however, a client who cannot pay an attorney his usual fee may agree to pay a premium for legal services should the attorney succeed.

Free legal services confer a substantial benefit on a client. In exchange for that benefit, it is reasonable for the attorney to charge a fee to the client, if the case is won, that is greater than the fee a fee-paying client would be charged for the time expended. In such a case, the client is the direct beneficiary of the agreement, and the attorney, who usually agrees to a fee that is measured by a percentage of any damages award, has an incentive not only to win but also to litigate the case efficiently. The less time an attorney spends in winning the case, the greater is his profit.

By contrast, defendants, who pay fees pursuant to fee-shifting legislation, do not bargain with plaintiffs' counsel over the terms of a fee agreement and secure no benefit from it. Furthermore, if such a case is brought on a contingent-fee basis, the plaintiff has no incentive to monitor how much time his attorney spends on it and an attorney's incentive to be efficient may be reduced because the defendant will be obliged to pay for all time reasonably spent on the litigation at his market rates.

Given these differences, this Court should not attribute to Congress a purpose to shift to defendants responsibility to pay a premium that a client might have agreed to pay for free representation, or for representation at rates below those usually charged by an attorney. There is no reason to assume that, under fee-shifting, Congress intended to make defendants, including public defendants, act as insurers for misjudgments by plaintiffs' attorneys. Put another way, there is no reason to assume that Congress intended to protect attorneys for plaintiffs against the consequences of their errors in assessing the merits of a case and to have that protection paid in part by hard-pressed taxpayers.

In short, this Court should not interpret Congress's directive to courts to award a reasonable attorney's fee to a pre-

vailing party as a directive that defendants must pay fee awards to plaintiffs' counsel to compensate counsel for risk of loss in contingent-fee cases. Instead, given the competing interests that Congress normally takes into account, this Court should conclude that Congress intended that counsel be paid only for all time reasonably expended on a case.

B. The Legislative History.

The limited legislative history addressing the issue of what constitutes a reasonable attorney's fee under the typical federal fee-shifting statute does not support risk enhancement. This history consists principally of the Senate and House Reports accompanying 42 U.S.C. § 1988, S. Rep. No. 94-1011 (1976); H.R. Rep. No. 94-1558 (1976). These reports cite with approval *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), a decision that listed 12 factors that should be considered in calculating a reasonable attorney's fee under a fee-shifting statute, including whether the fee for a case is fixed or contingent.[6]

To the extent that this legislative history is pertinent, it supports the lodestar approach that this Court has adopted. Thus, as this Court stated in *Blanchard v. Bergeron*, "[t]he legislative history . . . is instructive insofar as it tells us: '*In computing a fee award, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter.*' " 489 U.S. at 91, quoting S. Rep. 94-1011 at 6 (internal quotation marks omitted) (emphasis added). Furthermore, this Court has eliminated the independent significance of most of the *Johnson* factors. For example, this Court has "specifically held . . . that the 'novelty [and]

[6] The Senate Report also approvingly cites three district court cases applying in various ways *Johnson's* 12 factors. S. Rep. No. 94-1011 at 6. These three cases have been analyzed by this Court on a number of occasions. *See, e.g., Blanchard v. Bergeron, supra*, 489 U.S. at 91-93; *Delaware Valley II, supra*, 483 U.S. 723-24; *Blum v. Stenson, supra*, 465 U.S. at 893-95.

complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Delaware Valley I, supra*, 478 U.S. at 565, *quoting Blum, supra*, 465 U.S. at 898-900.

As noted, the legislative history refers to *Johnson*, and *Johnson* states that one factor a court should consider is whether the fee for a case is fixed or contingent. This reference does not support a risk enhancement, however, because *Johnson* goes on to suggest that the purpose of this inquiry is to set a cap on a fee that may be awarded under a fee-shifting statute. *Johnson* states: "In no event . . . should the litigant be awarded a fee greater than that he is contractually bound to pay, if indeed the attorneys have contracted as to amount." 488 F.2d at 718.

In *Blanchard v. Bergeron*, of course, this Court decided that this reference did not establish a Congressional intent to cap fee awards, and instead unanimously ruled that a contingent-fee agreement may not impose a ceiling on a statutory fee award, computed by multiplying a reasonable hourly rate by the number of hours reasonably expended. In so ruling, this Court underscored the presumption that the lodestar is a reasonable attorney's fee for defendants to pay under the typical fee-shifting statute. Thus, in *Blanchard*, the Court reiterated that such a fee-shifting statute:

> contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, *no more and no less*. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way.

Id. at 93 (emphasis added). Finally, in rejecting the argument that a statutory fee award against a defendant in excess of that permitted by a contingent-fee agreement will result in a windfall to attorneys, the Court stated:

> . . . [T]he very nature of recovery under [the typical fee-shifting statute] is designed to prevent any such "windfall." Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim.

Id. at 96.

In short, the legislative history, to the extent that it is relevant and instructive, indicates that attorneys receiving fees pursuant to fee-shifting statutes are entitled to lodestar awards, no more and no less.

C. Reasonable Client-Paid Fees and Reasonable Fee-Shifting Awards.

Given the obvious differences between a purely private fee agreement and fee liability imposed by law, there is no apparent reason to equate a reasonable fee that *a client* may agree to pay his counsel with a reasonable fee a *defendant* may be obliged to pay under a fee-shifting statute. Indeed, this Court has not done so.

Thus, as this Court unanimously ruled in *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990), plaintiffs' counsel may enforce promises by their contingent-fee clients to pay them fees well in excess of a lodestar fee award. In *Venegas*, this Court upheld a contract in which the client agreed to pay his attorney 40% of any damages award; permitted his attorney to seek fees from the defendant under 42 U.S.C. § 1988; and provided that any statutory fee award would be applied against the fee for which the client was responsible.

The client received a damages award of $2.08 million; and the court awarded a statutory fee against defendants in the amount of $117,000, which consisted of a lodestar award doubled for competent performance. When the client refused to honor his contract, his attorney sued him for fees of $406,000.

In upholding the agreement, the Court assumed that *Delaware Valley II* would not have authorized a defense-paid risk enhancement of that magnitude. Nevertheless, it ruled that § 1988 did not invalidate the contingent-fee agreement even though the fee privately agreed to turned out to be seven times the lodestar award.

On the other hand, as the Court ruled in *Blanchard*, a contingent-fee agreement, bargained for in the marketplace and presumably producing a reasonable fee, does not place a cap on a statutory fee award that an attorney may recover from the defendant. Nor, as this Court ruled in *Riverside v. Rivera*, 477 U.S. 561 (1986), need a statutory fee award be proportionate to the award of damages received in a case, as the fee under the typical private contingent-fee contract necessarily must be. There, this Court upheld a statutory fee award of $245,456.25 in a case that produced a damages award of only $33,350.00.

II. THE EVIDENCE IN *DAGUE*, AS IS TYPICAL IN CASES ATTEMPTING TO APPLY *DELAWARE VALLEY II*, IS WOEFULLY INADEQUATE TO ESTABLISH THAT RISK ENHANCEMENT IS NECESSARY TO ENSURE THAT PERSONS WITH MERITORIOUS CLAIMS UNDER FEDERAL FEE-SHIFTING LEGISLATION SECURE COUNSEL.

Following *Delaware Valley II*, courts across the country struggled to determine whether, and in what amount, a risk enhancement is necessary to ensure that persons with meritorious claims under fee-shifting statutes secure counsel. In this struggle, courts often asked whether, without risk en-

hancement, a person with a meritorious claim would have substantial difficulties obtaining counsel. The Second Circuit in *Dague* took an *ad hoc* approach to this concept, an approach that reflects elements of the plurality's secondary position in *Delaware Valley II* and of Justice O'Connor's concurring opinion. Another approach drew upon Justice O'Connor's class-based, market analysis and reflected elements of the dissent's basic contingent-fee analysis. This approach was adopted by panels of the District of Columbia Circuit in *McKenzie* and *King*, and then overturned *en banc*.

Despite the differences in these approaches, they have important elements in common: (1) an assumption that courts should, and can, make judgments on the availability and level of risk enhancement under federal fee-shifting statutes even though these judgments are legislative, not judicial, and even though judicial judgments on risk enhancement are likely to alter the market rather than reflect it; (2) an assumption that whatever burden plaintiffs must satisfy to demonstrate need for a risk enhancement may be discharged by self-serving and anecdotal attorney affidavits even though such affidavits, in important respects, demonstrate that a lodestar award, properly computed and adjusted for delay, is adequate to attract counsel, and even though the plaintiffs before the court had no difficulty obtaining counsel without an assurance of a premium for risk; and (3) assumptions that each and every attorney in the market is an attorney fully employed doing work for fee-paying clients and that the only motive attorneys have in representing clients is to maximize profits.

Amici submit that each of these assumptions is erroneous and that *Dague*, as well as the cases in the D.C Circuit, demonstrate that plaintiffs have utterly failed to show that risk enhancement is necessary. First, as *amici* already have discussed, courts should not inquire about need because Congress did not authorize risk enhancements under the typical

fee-shifting statute. In addition, for the reasons set forth in part III of this brief, the judgments that must be made to authorize risk enhancements are judgments that are legislative, not judicial, in character. Concomitantly, judicial judgments on risk enhancement are bound to alter the market artificially, not to reflect how the market operates.

Second, plaintiffs and their attorneys may not discharge their burden to show need for risk enhancement by marshalling affidavits from attorneys that are anecdotal in content and self-interested in motivation. Thus, in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court characterized a record based on attorney affidavits virtually identical to the record in *Dague*, as "blatantly insufficient to meet [the] . . . burden of proof, even if entirely unrebutted." *Id.* at 724. The affidavits in *Dague*, like the affidavits in *Triplett*, are "small in volume, anecdotal in character, and self-interested in motivation . . .." *Id.* at 725. The attorney affidavits in *McKenzie* and *King* are similar in content and motivation to those in *Dague*, and although they are more numerous, this can hardly be regarded as significant in view of the fact that there are far more attorneys in Washington, D.C., than there are in Burlington, Vermont. Here, as in *Triplett*, moreover, the hard record evidence, as well as the attorney affidavits, undercut in important respects the claim that risk enhancement is needed. Overall, the records in *Dague*, *McKenzie*, and *King*, far from establishing a need for a risk enhancement, permit just the opposite inference.

Finally, as *Dague*, *McKenzie*, and *King* demonstrate, not all attorneys in this country are fully engaged doing work for fee-paying clients. In addition, as *McKenzie* and *King* demonstrate, there are a range of market players, including not-for-profit legal services organizations, and for-profit attorneys and firms willing to do work on a *pro bono* basis. These attorneys, of course, are entitled to lodestar fee awards at market rates should they prevail. Lodestar awards,

of course, compensate legal services organizations at levels that exceed their costs and change dramatically the rewards of *pro bono* representation.

A. *Dague*.

In *Dague*, plaintiffs' counsel requested a 100% risk enhancement. They supported this request by five attorney affidavits. Two of these affidavits were submitted by counsel for plaintiffs, Richard N. Bland and William W. Pearson; three were from attorneys not associated with the case.

The Bland affidavit made two principal points: (1) "An important factor in this firm's decision to pursue [this case] . . . was the *opportunity* to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount;" and (2) " . . . I am of the opinion that Plaintiffs would have faced extreme difficulties in finding other local counsel of similar experience to pursue their claims . . . on a hourly rate to be paid only on the contingency of success." Bland Aff. ¶ 9 (emphasis added). Mr. Pearson, in turn, explained that most counsel in complex environmental cases filed in Vermont are from Boston, New York City, and Washington, D.C. Pearson Aff. ¶ 4. Risk enhancement was needed because, in Mr. Pearson's "considered judgment[,] . . . plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself." Pearson Aff. ¶ 8. The bases for that conclusion were: the case was fully contingent; there are few attorneys in Vermont who are experienced environmental attorneys; the defendant was a municipality, a factor that "increas[es] the uncertainty of strategy and outcome;" and the time expended on the case was substantial. Pearson Aff. ¶ 8.[7] The three attorneys not associated with the case merely stated that when they, or

[7] As this Court ruled in *Delaware Valley II*, however, the fact that a "defendant is difficult or obstreperous does not enter into assessing the risk of loss or determining whether that risk should be compensated." 483 U.S. at 716.

attorneys they know, take cases on a contingent-fee basis, they attempt to set the percentage of recovery allocable to their fees at a level that would be greater than they would receive had the clients been able to pay on a hourly basis.

The reality revealed by the record in *Dague*, however, is somewhat different from the purpose for which the attorney affidavits were submitted. Here, counsel took the case on a contingent-fee basis even though there was only a possibility, not a probability, and certainly not a certainty, of receiving an enhanced fee award should they prevail. And, the affidavits do not state that petitioners had any difficulty persuading Messrs. Bland and Pearson to work on their case in these circumstances.

The trial court, nevertheless, granted a 25% enhancement, applying a test that asked "whether '[w]ithout the *possibility* of a fee enhancement . . . competent counsel *might* refuse to represent [environmental] clients thereby denying them effective access to the courts.' " *Dague* Cert. Pet. App. 132a (emphasis added) (brackets supplied by court) (internal quotation marks omitted). The bases for the 25% enhancement were: this was a contingent-fee case that precluded counsel from undertaking fee-paying employment; the risk of not prevailing was "substantial," as "evidenced in part by the court's denial of plaintiffs' motion for a preliminary injunction;" plaintiffs did not "ultimately prevail until after trial;" and there was "delay in receiving payment." *Dague* Cert. Pet. App. 131a-33a. The trial court rejected the argument that enhancement of the lodestar was proper based on the novelty of the issues, the complexity of the litigation, and the skill and experience of counsel because these factors are reflected in the lodestar. *Dague* Cert. Pet. App. 131a.

The Second Circuit, in affirming, observed that the case was fully contingent and that the trial court had determined that "the risk of not prevailing was substantial." *Dague* Cert. Pet. App. 37a. In addition, the Second Circuit noted that the trial court, "[a]fter considering the . . . affidavits

on file, . . . also [had] found that absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff[s] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence for this difficult case in a complicated field of law." *Dague* Cert. Pet. App. 37a.

These decisions are flawed for several reasons. First, both the trial court and the Second Circuit took into account the risks of the specific case in permitting an enhancement.[8] Second, the trial court considered: (1) the length of the litigation in its risk enhancement award, even though that element should be reflected in the lodestar; and (2) plaintiffs' counsel's delay in receiving their fees, even though this element is quite distinct from risk. *See, e.g., Delaware Valley II, supra*, 483 U.S. at 716; *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Third, preclusion of other employment is analytically distinct from risk, and irrelevant — since counsel received a lodestar award for the time they reasonably expended on the litigation and presumably at rates equivalent to those they would otherwise have charged to fee-paying clients.[9] Finally, the decisions offer no reasoned basis for distinguishing this contingent-fee case from any other such case or for the award of 25%, as opposed to some other percentage.

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[8] In contrast to the *ad hoc* approach to risk enhancement for work at the trial level, the Second Circuit denied an unopposed motion for risk enhancement for the appeal, stating that "[t]he 'risk' involved in defending an appeal is not significant and, in the circumstances of this case, calls for no enhancement to the 'lodestar' amount." *Dague* Cert. Pet. App. 39a. This across-the-board approach to defending appeals, which contradicts what every appellate lawyer knows — that the risks of defending an appeal vary greatly — also illustrates the difficulties courts have in making sound determinations concerning risk enhancement.

[9] The preclusion-of-other-employment determination apparently was based on an affidavit by one of plaintiffs' counsel that merely stated that he and his firm previously had limited their practice "to representing fee-paying clients, because of the risk associated with the representation of . . . plaintiffs on a contingency fee basis" and "[t]hus, most of the hours spent on this matter would have been spent representing other

[Footnote continued on next page]

Even assuming that the lower courts in *Dague* had focused solely on risk in determining the propriety of a risk enhancement, the evidence that an enhancement was necessary to ensure that persons with meritorious claims could secure counsel without substantial difficulties was wholly lacking. The *Dague* affidavits are utterly insufficient under *Triplett* to establish that an award limited to the lodestar would cause persons with meritorious claims substantial difficulties in finding counsel, or that a 25% risk enhancement is necessary to ensure that this client, and others with meritorious claims, are able to secure counsel without substantial difficulty.

B. *McKenzie & King.*

The panel decisions in *McKenzie* and *King* established an extraordinary rule on risk enhancements applicable to all litigation brought under most federal fee-shifting statutes in the District of Columbia: whenever a defendant does not prevail in such a case, it must pay a 100% enhancement of the lodestar fee award to the extent that the case was taken by plaintiff's counsel on a contingent-fee basis. App. 58A. A 100% enhancement was authorized irrespective of whether plaintiff's counsel is a not-for-profit legal services organization whose *raison d'etre* is to bring suits without charging a fee; a large law firm engaging in "*pro bono*" litigation; or a sole practitioner or small firm willing to take a case on a contingent-fee basis without any assurance of a risk enhancement. See App. 58A; *McKenzie v. Kennickell, supra*, 875 F.2d at 331-32.

[Footnote continued from previous page]
clients who would pay our hourly rates on a monthly basis." Bland Aff. ¶ 9. Plaintiffs' counsel did not state, however, that he or his firm had turned away fee-paying clients as a result of their representation of petitioners. Even if he or his firm had done so, however, this certainly does not prove that a risk enhancement was necessary to persuade them to take the contingent-fee case.

In *McKenzie*, a panel of the D.C. Circuit relied on Justice O'Connor's opinion in *Delaware Valley II* to reject a challenge by the United States to a 50% risk enhancement in a Title VII action taken on a contingent-fee basis. The court upheld the award even though counsel in *McKenzie* were two not-for-profit legal services organizations and a major District of Columbia law firm, which had made clear that it would have represented the claimants "even if it believed that no enhancement to the lodestar fee would be available." 875 F.2d at 338. In its opinion, the panel also stated, based on "more than 20" attorney affidavits (*id.* at 336), that a 100% risk enhancement appeared to be the rate demanded by counsel in the relevant market, which it defined as "all contingency claims in the District of Columbia, particularly other types of complex federal litigation . . .." *Id.* at 334.

In *King*, also a Title VII action, a panel of the D.C. Circuit ordered a 100% enhancement based on *McKenzie*, and on: (1) affidavits by a handful of Title VII attorneys stating that they would not accept a case on a contingent-fee basis unless they could be assured of a 100% enhancement if they prevailed; and (2) an assumption that a 100% enhancement is necessary to ensure that attorneys take cases for which there is at least a 50% chance of prevailing. App. 56A-57A.[10]

The court ordered a 100% enhancement even though Ms. King had no difficulty finding counsel, Robert A. Adler, to represent her on a contingent-fee basis in March, 1983, when risk enhancements were few in number and small in amount. App. 4A, 50A. Indeed, Ms. King contacted Mr. Adler after he had just won a case on behalf of one of her colleagues for which he had received a risk enhancement of only 10%. App. 4A-5A. Furthermore, the panel awarded 100% even though,

[10] The affidavits are described in various places in the panel and *en banc* decisions in *King*. See App. 6A-7A, 15A-16A, 39A-41A, 44A, 53A, 56A, 59A, 64A. They have been filed with this Court in support of the petition for a writ of certiorari in *King*, and are also discussed in *King* Cert. Pet. 8-13.

before *Delaware Valley II*, Mr. Adler twice sought only a 35% risk enhancement, and the trial court had preliminarily ruled that 15% would be proper should this Court authorize risk enhancements in *Delaware Valley II*. App. 5A. The panel ordered 100%, moreover, even though the trial court had awarded 50% and also purported to follow Justice O'Connor's opinion in *Delaware Valley II*. See App. 5A-6A, 53A.

The risk enhancements granted in *Dague*, *McKenzie*, and *King* illustrate the considerable evidentiary and legal difficulties facing courts in attempting to formulate sensible rules to govern these issues. Thus, both the Second Circuit and the D.C. Circuit relied on attorney affidavits to demonstrate need although such evidence is insufficient as a matter of law. Furthermore, these affidavits are contradicted by the undeniable fact that attorneys take contingent-fee cases pursuant to fee-shifting legislation, as plaintiffs' counsel did in *Dague*, *McKenzie*, and *King*, without an assurance of receiving a premium for risk.

In addition, in interpreting *Delaware Valley II*, the courts have come up with very different approaches. Insofar as entitlement to risk enhancement is concerned, the Second Circuit purported to adopt an *ad hoc* approach but did not adequately explain why *Dague* differs from any other contingent-fee case. The panels in *McKenzie* and *King*, in turn, took an across-the-board approach purporting to be based on an analysis of the market but which, in fact, ignored variations in the market. The inadequacy of these attempts to measure the market is demonstrated by the disparity between the 25% enhancement granted in *Dague*, and the 100% authorized by the panels in *McKenzie* and *King*, as well as the disparity between the 100% enhancement authorized by those panels and the 50% granted by the trial court in *King*, a disparity that arose even though the trial court purported to apply the test applied by the panels in *McKenzie* and *King*.

III. RULES GOVERNING AN AWARD OF FEES TO COMPENSATE COUNSEL FOR RISK OF LOSS ARE POLITICAL JUDGMENTS TO INTERVENE IN THE MARKET WHICH SHOULD BE MADE BY CONGRESS.

Dague and the now-abandoned approach of the D.C. Circuit demonstrate that the propriety of any award of fees in order to compensate counsel for risk of loss is a political judgment to intervene in the market which should be made by Congress. It is not a judgment that this Court, or any court, can make.

As Judge Williams stated, in commenting on the 100% risk enhancement adopted in *McKenzie* and *King*,

> For when we look beneath the veneer of market analysis, the allowance of a 100% enhancement is clearly legislative — making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better. I know of no basis on which a court would be competent to set that level — or any other.

App. 65A.[11] Furthermore, Judge Williams also commented on the fact that not until *Delaware Valley II* was announced, did Mr. Adler request a risk enhancement of 100%. Judge Williams concluded: " . . . I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa." App. 64A. *Accord* App. 18A

[11] The court did not, in fact, undertake to determine whether Ms. King's chance of prevailing was at least 50%. Had the court done so, the evidence suggests that Ms. King may not have overcome that hurdle. Thus, as the *en banc* court in *King* observed, only five of the numerous attorney affidavits filed in the case addressed the issue of Ms. King's ability to secure counsel. Two of them "described the weakness and difficulty of her case as the principal reason the affiants would have been unwilling to assume representation," and one stated that his firm might have represented her *if* she had had an " 'exceptionally strong claim.' " App. 15A n.4.

Judge Williams is correct Whether to grant a risk enhancement, to whom, in what circumstances, and in what amount, are judgments that should be made by Congress. The fundamental policy decisions that must be made are how much litigation under federal fee-shifting statutes should be encouraged, and how the costs of this litigation should be allocated. These decisions necessarily rest not only on an understanding of what are commonly regarded as legislative facts but also on a balancing of competing interests not ordinarily encompassed in the judicial function.

Thus, for example, Congress may well consider the following questions in fashioning a law governing risk enhancement:

1. How many cases are successfully brought under federal fee-shifting legislation? If plaintiffs prevail in fewer than 50% of these cases, is it sound policy to provide an added incentive to attorneys to bring what necessarily will be even riskier cases than those already brought, or does public policy favor a level of incentive to ensure that each and every meritorious case is brought even though that level may result in 25 nonmeritorious claims being brought for each successful claim?

2. Should a risk enhancement be granted to not-for-profit legal organizations, which are in the business of bringing cases without fees to their clients, which already are being awarded lodestar fees at market rates, and which pay no income taxes? Should a risk enhancement be granted to attorneys whose market rates exceed those of the median private attorney in a market? Should a risk enhancement be given to attorneys, such as those in *McKenzie*, who agree to bring cases as part of a law-firm *pro bono* program without regard to risk enhancement?

3. Should a risk enhancement be automatically available to prevailing plaintiffs against government entities or should such plaintiffs be entitled to such an award only if the government's position was not substantially justified?

4. How does one set an appropriate level of risk enhancement? Do cases in which plaintiffs prevail take as much time on average as cases in which plaintiffs lose, even though plaintiffs must usually go the "full route" to win but may lose on a motion to dismiss or for summary judgment? Should the same level of enhancement be granted to all attorneys who are entitled to risk enhancement, and if not, who should receive greater risk enhancement?

These policy judgments, and more, must necessarily be made by this Court if it is to approve risk enhancements under federal fee-shifting legislation. As the litigation following *Delaware II* indicates, moreover, these judgments cannot be made in the expectation that what is being done reflects the market. Instead, any court-imposed risk enhancement constitutes an intervention in the market that will yield endless litigation.

CONCLUSION

This Court should reverse the judgment of the Second Circuit on the ground that risk enhancements are not permitted under the typical fee-shifting statute.

Respectfully submitted,

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel
Counsel of Record

Counsel for the District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* February 27, 1991

Decided December 13, 1991

No. 89-7027

MABEL A. KING,
APPELLANT

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*

No. 89-7028

MABEL A. KING

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,
APPELLANTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-1980)

Roger E. Warin, with whom *Bryan T. Veis* was on the brief, for appellant in 89-7027 and appellee in 89-7028. *Robert M. Adler* and *Joel P. Bennett* also entered appearances for appellants.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid, Sr.*, Corporation Counsel, *John Payton,* Acting Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief, for appellees in 89-7027 and appellants in 89-7028. *Susan S. McDonald,* Assistant Corporation Counsel, also entered an appearance for appellees in 89-7027 and appellants in 89-7028.

Michael J. Ryan, Assistant United States Attorney, with whom *Stuart M. Gerson,* Assistant Attorney General, *Jay B. Stephens,* United States Attorney, *John Oliver Birch* and *R. Craig Lawrence,* Assistant United States Attorneys, were on the brief, for *amicus curiae* the United States of America in 89-7027 and 89-7028 urging reversal.

John J. Curtin, Jr., Rex E. Lee, Carter G. Phillips, and *Joseph R. Guerra* were on the brief for *amicus curiae* The American Bar Association in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Daniel B. Edelman, Barry Goldstein, and *Mari Mayeda* were on the brief for *amici curiae* Joel P. Bennett, et al. in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Blair G. Brown, Brenda V. Smith, and *Richard S. Seligman* were on the brief for *amicus curiae* the District of Columbia Bar in 89-7027 and 89-7028 urging that the panel's decision be reinstated.

Charles Stephen Ralston for NAACP Legal Defense Fund and Educational Fund; *E. Richard Larson* for Mexican American Legal Defense and Educational Fund; *Joseph M. Sellers* for Washington Lawyers' Committee for Civil Rights under Law; *Gregory O'Duden, Elaine Kaplan,* and *Timothy Hannapel* for National Treasury Employees Union; and *Paul M. Smith* for Washington Council of Lawyers, were on the joint brief for *amici curiae* in 89-7027 and 89-7028 urging that the panel's opinion be reinstated.

Daniel J. Popeo entered an appearance for *amicus curiae* The Washington Legal Foundation and the Allied Educational Foundation in 89-7027 and 89-7028 urging reversal.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, THOMAS,* HENDERSON, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by SILBERMAN, *Circuit Judge,* in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges,* concur.

Dissenting opinion filed by EDWARDS, *Circuit Judge,* with whom MIKVA, *Chief Judge,* WALD and RUTH B. GINSBURG, *Circuit Judges,* join.

SILBERMAN, *Circuit Judge,* in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges,* concur: This case concerns the circumstances in which a court making an award of reasonable attorney's fees under federal fee-shifting statutes may augment the lodestar with a contingency enhancement designed to compensate the prevailing party's attorney for the risk of losing the case. The panel opinion in this case, *King v. Palmer,* 906 F.2d 762 (D.C. Cir. 1990), reviewed a district court award of attorney's fees and costs made to the plaintiff, Mabel King, pursuant to the fee-shifting

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*Shortly after oral argument, Judge (now Justice) Thomas recused himself and has not participated in this decision.

provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d).[1] The panel rejected the District of Columbia's contention that no enhancement for the risk of nonpayment was proper but set aside the district court's award of an enhancement of 50% of attorney's fees subject to contingency, holding instead that Ms. King was entitled to a full 100% enhancement of those fees, relying on this court's decision in *McKenzie v. Kennickell,* 875 F.2d 330 (D.C. Cir. 1989). On September 12, 1990, we granted the District of Columbia's petition suggesting rehearing *en banc* to reconsider the holding on contingency enhancements in *McKenzie.* Having reviewed the issue *en banc,* we overrule *McKenzie* and reverse the award of a contingency enhancement to Ms. King.

I.

Mabel King brought a gender discrimination claim against her employer, the District of Columbia, and ultimately received an award of back pay and retroactive promotion. *See King v. Palmer,* 778 F.2d 878, 882 n.7 (D.C. Cir. 1985), *on remand,* Civ. No. 83-1980, Mem. at 1-5 (D.D.C. June 11, 1986). The history of the substantive litigation underlying the dispute over attorney's fees is summarized in the panel opinion. *See King,* 906 F.2d at 764.

Ms. King experienced no difficulty in securing an attorney. She was represented throughout the litigation by the first attorney she contacted, Robert Adler, who took the case on a partial contingency basis. Ms. King contacted Mr. Adler as a result of his successful representation of

[1] 42 U.S.C. § 2000e-5(k) provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

Section 2000e-16(d) extends the provisions of § 2000e-5(k) to actions by employees of the District of Columbia. Congress has made clear that it intends the courts to resolve the policy questions inherent in determining what is "reasonable." *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 8 (1976).

a colleague of hers in another Title VII case, for which he had received a 10% contingency enhancement. Ms. King and Mr. Adler agreed that she would be responsible for litigation costs and expenses, as well as for fees of up to $5000, and that she would receive any award of damages, while Mr. Adler would receive any statutory attorney's fees that might be awarded, should Ms. King prevail. *See id.*

Mr. Adler averred that he took the case expecting that a contingency enhancement would be available. In his applications for attorney's fees following Ms. King's success on the merits, Mr. Adler twice requested a 35% fee bonus to compensate him for the risk of nonpayment he had borne during the litigation, but the district court held this request in abeyance pending the Supreme Court's decision concerning the availability of contingency enhancements in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*). In the interim, the district court awarded a lodestar fee totaling $232,707.62, which comprised the reasonable number of hours Mr. Adler spent on the case multiplied by a reasonable hourly rate, and noted that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." *King v. Palmer,* Civ. No. 83-1980, Rev. Mem. at 13 (D.D.C. June 10, 1987) (*Mem. Op. I*).

After the Court issued its fragmented decision in *Delaware Valley II,* Mr. Adler reapplied for a contingency enhancement, increasing his request to 100%. Reading Justice O'Connor's concurrence in *Delaware Valley II* as controlling the availability and degree of contingency enhancement, the district court held that the plaintiff must establish how the market compensates for contingent cases on a class-wide basis and then show that without such enhancement she would have had substantial difficulty attracting competent counsel to her case. *See King v. Palmer,* Civ. No. 83-1980-LFO, Mem. at 2 (D.D.C. Sept. 20, 1988) (*Mem. Op. II*). In the district court's view,

Ms. King met these requirements by introducing affidavits from a number of local attorneys experienced in Title VII work asserting that they would not accept fee-shifting cases where fees were available only if the case was won, absent the prospect of contingency enhancements. *See id.* at 3. Since Ms. King had agreed to pay all costs and expenses and the first $5000 of fees, however, the district court found that Mr. Adler's representation of her was only partially contingent and awarded a 50% enhancement instead of the 100% requested, on the authority of an earlier district court opinion in *Palmer v. Schultz,* 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed,* No. 88-5108 (D.C. Cir. 1988). *See Mem. Op. II* at 3-4. Both parties appealed.

The panel, following our previous opinion in *McKenzie v. Kennickell,* 875 F.2d 330 (D.C. Cir. 1989), affirmed the district court's award of a contingency enhancement but increased it from 50% of the lodestar to 100%. *McKenzie* established a regime in which contingency enhancements would be routinely available in statutory fee-shifting cases. In reaching this result, the *McKenzie* panel treated Justice O'Connor's concurring opinion in *Delaware Valley II* as controlling and explicitly applied her admonition that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment) (quoting plurality opinion at 731). The *McKenzie* majority described the inquiry to be conducted under this test as "counterfactual," meaning that plaintiffs "need not show that [they] *actually* experienced difficulty in obtaining representation," but merely that, "absent a contingency enhancement, plaintiffs *would have* encountered substantial difficulties in finding counsel ... [at the time] they commenced their lawsuit." *McKenzie,* 875 F.2d at 337 (first emphasis added, second in original). Thus, the majority concluded that a prevailing plaintiff under the

typical fee shifting-statute could gain a contingency enhancement by producing affidavits from lawyers in the District of Columbia stating that those lawyers would not *normally* take a case on contingency unless they were paid more than their normal hourly fees if they won. Indeed, according to the majority, it was entirely irrelevant whether counsel in the case had been "attracted by the possibility of a contingency enhancement"; the panel dismissed as beside the point the fact that one of the lawyers who took the case, the head of the *pro bono* section of a major Washington law firm, candidly stated that his firm would have taken the case even without the prospect of a contingency enhancement. *Id.* at 338. The majority reasoned that were it to deny a contingency enhancement on an "actual difficulty" basis, it would simply encourage a "charade" in which "public interest lawyers would accept a case only after announcing loudly that they were doing so on the assumption of a contingency enhancement." *Id.* at 337-38. In short, under the *McKenzie* holding, even a plaintiff who easily found counsel and whose counsel presumably expected no contingency bonus could satisfy the "substantial difficulties" test.

Judge Buckley, dissenting on this issue, thought the *McKenzie* majority misread *Delaware Valley II.* He pointed out that "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' in obtaining competent counsel ... absent an upward fee adjustment for contingency risks." *Id.* at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II,* 483 U.S. at 733) (emphasis in original). That meant, according to Judge Buckley, that we were required to pursue an "individualized approach" in which evidence of *actual* difficulties would be extremely important. *Id.* at 341.

> Because the record establishes that McKenzie and his fellow plaintiffs had *in fact* located qualified lawyers willing to represent them in Washington, D.C. in the early 1970's, I conclude that under *Delaware Valley II these fee applicants have failed to prove that*

> *the prevailing party "would have faced substantial difficulties"* in securing competent attorneys absent the incentive of an enhanced fee.

Id. (emphasis added).

In accordance with *McKenzie*, the panel in this case thought the failure of the district court to make a specific finding that Ms. King would have faced substantial difficulties in obtaining counsel without a risk enhancement was of no real significance. *See King*, 906 F.2d at 768. The district court had instead relied on Ms. King's attorney affidavits and on a case in which a different district judge had made a blanket finding "that attorneys in the District would not accept contingent cases without some risk enhancement." *Id.* (citing *Mem. Op. II* at 2, 4 (citing *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed*, No. 88-5108 (D.C. Cir. 1988))). The panel held that the cross-citation to the other district judge's finding in conjunction with the affidavits filed in the case was sufficient to satisfy *McKenzie*'s reading of Justice O'Connor's opinion.

We decided to rehear the case *en banc* in order to reconsider the interpretation of *Delaware Valley II* that the panel in *McKenzie* adopted. It is our view that the approach followed by the majority in *McKenzie* is, as Judge Buckley argued, a misreading of Justice O'Connor's concurring opinion. Moreover, we do not think that Justice O'Connor's concurring opinion in *Delaware Valley II* controls the issue of the circumstances under which contingency enhancements are permitted. We conclude that the fragmented decision in *Delaware Valley II* provides no test for determining the availability, much less the calculation, of contingency enhancements under fee-shifting statutes and that we are therefore obliged to continue the search for the most sensible rule to govern contingency enhancements. The rule we adopt is that of the *Delaware Valley II* plurality: a reasonable lodestar fee awarded under federal fee-shifting statutes may not be enhanced to compensate a prevailing party for his initial risk of loss.

II.

A.

Delaware Valley II has given rise to a spate of circuit court opinions that attempt—with varying degrees of confidence—to interpret the Supreme Court's position. *See, e.g., Rode v. Dellarciprete*, 892 F.2d 1177, 1184-85 (3d Cir. 1990); *Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 379-82 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327-28 (4th Cir. 1989); *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988); *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988); *Hendrickson v. Branstad*, 934 F.2d 158, 162-63 (8th Cir. 1991); *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990); *Fadhl v. City of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988) (per curiam); *Smith v. Freeman*, 921 F.2d 1120, 1122-23 (10th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988). We, like our sister courts of appeal, have struggled to take from the case a rule of law that defines the circumstances in which contingency enhancements may be awarded to the lawyers who represent prevailing plaintiffs under the myriad of federal fee-shifting statutes. *See McKenzie v. Kennickell*, 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc).

The Supreme Court's decisions on attorney's fees prior to *Delaware Valley II* had established the lodestar—a

measure of fees defined by the number of hours reasonably expended on a case multiplied by a reasonable market rate per hour—as the presumptively reasonable award, steadily subsuming most other factors into that single calculation. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983); *Blum v. Stenson,* 465 U.S. 886, 897-902 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 564-66 (1986) (*Delaware Valley I*). Twice, however, the Supreme Court had specifically reserved the question whether the lodestar could ever be enhanced to reflect the risk of nonpayment assumed by an attorney accepting a case under a statute that authorized fees only to the prevailing party. *See Blum,* 465 U.S. at 901 n.17; *Delaware Valley I,* 478 U.S. at 568. *Delaware Valley II* attempted to resolve this issue.[2]

The judgment in *Delaware Valley II* reversed an award of a 100% contingency enhancement.[3] Justice White, writing for a plurality of four Justices, concluded in Part IV of his opinion that contingency enhancements under fee-shifting statutes are simply "impermissible." *Delaware Valley II,* 483 U.S. at 727 (plurality opinion). Nevertheless, the plurality went on in Part V to suggest that if contingency bonuses were to be made available at all, they

[2]We do not understand how, as the dissent suggests, the discrete question presented in this case—whether a contingency enhancement is properly included within an award of attorney's fees—can possibly be thought a matter for the discretion of the trial judge. If the overall reasonableness of a statutory attorney's fee award were always a matter for the trial judge's discretion, unguided by a legal structure, the Supreme Court certainly has wasted a good deal of time and effort attempting to develop uniform rules. *See Blanchard v. Bergeron,* 489 U.S. 87 (1989); *Delaware Valley II,* 483 U.S. 711 (1987); *Delaware Valley I,* 478 U.S. 546 (1986); *Blum,* 465 U.S. 886 (1984); *Hensley,* 461 U.S. 424 (1983).

[3]*Delaware Valley II* interpreted the fee-shifting provision of the Clean Air Act, 42 U.S.C. § 7604(d). However, the Court has said that its standards for determining "reasonable" fees apply to all federal statutes awarding "reasonable" attorney's fees to a "prevailing party," including Title VII. *See Hensley,* 461 U.S. at 433 n.7.

"should be reserved for exceptional cases." *Id.* at 728. Four Justices in dissent would have allowed a contingency enhancement in any case in which "an attorney and client have been unable to mitigate the risk of nonpayment," *id.* at 749 (Blackmun, J., dissenting), as well as "additional enhancement" in those cases posing great "'legal' risks." *Id.* at 751. Under the dissent's test, contingency enhancements would be "appropriate in most circumstances." *Id.* at 3741.

Justice O'Connor concurred in part and concurred in the judgment reversing the award. She agreed with the dissenters that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee." *Id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). But she joined in the plurality's judgment that the record before the Court did not justify a contingency enhancement. *See id.* at 734. She also agreed with the plurality that no enhancement could be awarded for the "legal" risks peculiar to the specific case. *See id.* at 731, 734. Finally, Justice O'Connor agreed with the statement in Part V of the plurality opinion "that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* at 733 (quoting plurality opinion at 731).

B.

In our prior opinions interpreting *Delaware Valley II,* we, like other circuit courts, have assumed that Justice O'Connor's concurrence controls. *See McKenzie v. Kennickell,* 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice,* 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell,* 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our Cumberland Mountains, Inc. v. Hodel,* 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds,* 857 F.2d 1516 (D.C. Cir. 1988) (en banc). But we have not focused on the

fact that there are two analytically distinct questions involved in awarding a contingency enhancement. First, a court must decide whether an enhancement is available at all. Then, assuming an enhancement is warranted, the court must calculate its amount. Virtually all of Justice O'Connor's relatively brief opinion deals with the second question. But the question of *availability* of enhancements logically precedes the question of their *calculation*.

To ascertain when contingency enhancements should be made available under *Delaware Valley II*, we have looked for some common ground between Justice O'Connor's concurrence and the plurality opinion. We have had little difficulty placing a *label* on that common ground, since Justice O'Connor expressly joined the plurality's statement in Part V that enhancements should be available only when a plaintiff would have faced "substantial difficulties" in attracting counsel to his case without the prospect of an enhancement. However, we and the other courts of appeals have had considerable trouble determining the *content* of that "substantial difficulties" label—that is, determining just how "substantial" the "difficulties" in attracting counsel have to be, and how they must be proven.

In this search for content, several of our sister circuits have read Justice O'Connor's concurrence as implicitly agreeing with the plurality's statement, *Delaware Valley II*, 483 U.S. at 727 (plurality opinion), that contingency bonuses should be available only in "exceptional cases." *See, e.g., Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate . . . ."). Appellant presses this position upon us here. And in *Thompson v. Kennickell*, we made a similar suggestion, describing *Delaware Valley II* in Gilbert and Sullivan terms: "What, never? No, never!" for the plurality, and "What, *never*? Hardly ever!" for Justice O'Connor. *Thompson*, 836 F.2d at 621 (emphasis in original).

To be sure, Justice O'Connor does not say at any point that she disagrees with the plurality's "exceptional cases" position. And she does endorse the plurality's view that the lodestar is a presumptively adequate fee. *See Delaware Valley II*, 483 U.S. at 733-34 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, Justice O'Connor joined the reversal of the award of a contingency enhancement *without a remand*, notwithstanding the dissenters' powerful argument that the applicant should be given an opportunity to develop the record to meet the Supreme Court's standard. *See id.* at 754-55 (Blackmun, J., dissenting); *cf. Thompson*, 836 F.2d at 621 (remanding for application of *Delaware Valley II*). This at least suggests that Justice O'Connor believed that contingency enhancements should be available only in those presumably rare situations in which the need was readily apparent. Still, she did not join Part V of the plurality opinion, so we cannot be sure that she accepted the "exceptional cases" limitation.

There is only one point concerning the availability of contingency enhancements that a fair reading of Justice O'Connor's concurrence clearly supports. This point is that evidence of *actual* difficulties is highly probative of the "substantial difficulties" *Delaware Valley II* describes. In adopting the plurality's "substantial difficulties" test, Justice O'Connor quotes from Part V of the plurality opinion. The passage she quotes concludes with a footnote that we presume Justice O'Connor adopted along with the textual language she cited. The footnote states: " 'an attorney's fee award should be only as large as necessary to attract competent counsel,' and '*one relevant factor bearing on high-risk is whether other counsel had declined to take the case because there was little or no prospect of earning a fee.*' " *Id.* at 731 n.12 (plurality opinion) (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)) (emphasis added). And, as Judge Buckley noted in *McKenzie*, "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' obtaining competent counsel 'in

the relevant market,' absent an upward fee adjustment for contingency risks." *McKenzie,* 875 F.2d at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment)) (emphasis in original). We thus believe that five Justices envisioned a particularized factual inquiry into the plaintiff's *actual* difficulties in retaining counsel—the kind of inquiry that Judge Buckley thought necessary but the majority in *McKenzie* eschewed. *But see Morris v. American Nat'l Can Corp.,* Nos. 90-1235, 90-2289, 1991 WL 15315, *5 (8th Cir. Aug. 14, 1991) (stating no actual difficulties need be shown) (citing *McKenzie,* 875 F.2d at 337).

This is, we recognize, a hard standard to meet. Indeed, if evidence that other counsel actually refused the case is only "one relevant factor" in determining whether the plaintiff would have had "substantial difficulties" in obtaining counsel without a risk enhancement—a factor insufficient by itself to justify awarding an enhancement —the plaintiff's burden in producing sufficient evidence to meet the test must be quite daunting. And it also follows that a plaintiff's failure to put on *any* evidence of actual difficulties in attracting counsel without extra compensation would severely undermine a claim for a contingency enhancement.

The district court here made no finding that Ms. King would have faced substantial difficulties in attracting counsel without a contingency bonus. Nor was there any evidence that Ms. King faced actual difficulties in securing representation. As it happened, Robert Adler was the first attorney the plaintiff contacted, and, although he later stated that he would not have accepted representation without the "definite possibility" of a contingency enhancement, his fee award in a previous case had been enhanced by only 10%. Given the uncertain state of the law at the time he took this case (which is not to say that it is particularly clear today) and his previous experience, the "definite possibility" to which he referred does not seem very weighty. In his engagement letter to Ms. King,

Mr. Adler referred only to charging his "hourly rates" and stated that he would "seek an award of attorneys' fees from the defendants *with respect to those amounts,* should we be the prevailing party." Joint Appendix (J.A.) at 73a (emphasis added). It does not seem to us that Mr. Adler's testimony goes very far to meet the plaintiff's burden under the "substantial difficulties" test.

Before the district court and again before us, Ms. King has also sought to rely on the affidavits of attorneys who were not approached by Ms. King and were never involved in the case.[4] These affidavits—some from Title VII practitioners, some from practitioners from other areas—contend that lawyers would not take cases on a non-fee-paying basis without contingency enhancements. We do not think that we can accept such evidence as meeting the substantial difficulties test. Without in any way denigrating the *bona fides* of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative, or even weighty, the substantial difficulties test would be met so easily as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. *See United States Dep't of Labor v. Triplett,* 110 S. Ct. 1428, 1433-34

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[4]Of these numerous affidavits, only five addressed the facts of Ms. King's particular case or expressed any opinion at all about whether Ms. King herself would have faced substantial difficulties in attracting competent counsel absent the availability of a contingency enhancement. Two of these described the weakness and difficulty of her case as the principal reason the affiants would have been unwilling to assume representation. *See* J.A. at 112d (Cashdan); 173b (Fitzpatrick). Another attorney allowed that his firm would possibly have represented Ms. King if she had an "exceptionally strong claim." J.A. at 124b (Chuzi). The fourth admitted there was at least a possibility, although "remote," of finding *pro bono* representation for Ms. King. *See* J.A. at 214 (Lapidus). Only a single affidavit stated flatly that the affiant would not take Ms. King's case because of the unavailability of contingency enhancements. *See* J.A. at 177 (Gottfried).

(1990) (holding such evidence to be "blatantly insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted").

Nor do we believe the few affidavits presented that expressed a view as to whether the affiant lawyer would or would not have taken Ms. King's case add much to her claim for an enhancement. Insofar as they seek to hypothesize whether the affiants would have taken her case, they focus (inevitably it seems to us) on the strength or weakness of her claim. *See supra* note 3. But in *Delaware Valley II,* it will be recalled, both the plurality and Justice O'Connor regarded that factor as inappropriate. *See Delaware Valley II,* 483 U.S. at 726 (plurality opinion); *id.* at 734 (O'Connor, J., concurring in part and concurring in the judgment).

In sum, even if we were to apply Justice O'Connor's concurrence as the holding of *Delaware Valley II,* we think Ms. King's evidence does not paint a picture of a situation where a contingency enhancement is necessary to "mak[e] it possible for poor clients with good claims to secure competent help." *Id.* at 730-31.

C.

Although we have determined that Ms. King failed to carry her burden under Justice O'Connor's opinion in *Delaware Valley II,* candor obliges us to concede that we are unable to set forth a conceptual framework that would govern further litigation on the subject of contingency enhancements. We have certainly suggested, in accordance with our understanding of the substantial difficulties test, that actual evidence that attorneys did refuse a case is of greater probative value than the hypothetical testimony of non-involved and self-interested lawyers. But we are sorely troubled by, and indeed we have no answer to, the *McKenzie* majority's argument that focusing on actual difficulties will encourage "a charade in which clients seeking representation under fee shifting statutes would be steered to several attorneys whose pre-arranged

role it would be to 'refuse' the case, knowing that such refusals were necessary to permit the eventual award of fees." *McKenzie,* 875 F.2d at 337. We think the *McKenzie* majority was also correct in suggesting that emphasizing the actual difficulties a plaintiff had in obtaining counsel will create perverse incentives by discouraging those very "reference services . . . that make it easier for litigants to find legal representation." *Id.*

To add to our quandary, even if we did have evidence that several lawyers had declined Ms. King's case, we think it would be impossible to separate out from their decision not to represent her the strength or weakness of her claim as it appeared to them at the time. After all, this is surely the principal reason a lawyer will turn down a case under a fee-shifting statute. *Delaware Valley II,* however, tells us unequivocally that the risk of loss in a particular case is not a factor that courts may look at in determining whether a contingency enhancement is appropriate. "[A] court should not award any enhancement based on 'legal' risks or risks peculiar to the case." *Delaware Valley II,* 483 U.S. at 734 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 726-27 (plurality opinion).[5] If the courts cannot do so directly, how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case?

The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial, because, by definition, the plaintiff stands before the court with coun-

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[5]The dissent, nevertheless, would calculate the amount of contingency enhancement based on the degree of risk faced by the plaintiff's lawyer in *each case.* As the plurality in *Delaware Valley II* noted, that approach would provide incentives to bring the weakest cases to court, and it would put the district judge who had to make that determination in a difficult psychological posture. *See Delaware Valley II,* 483 U.S. at 722; *id.* at 725 (plurality opinion).

sel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question years later, our inquiry is circular. As Judge Williams noted in his concurrence in the panel opinion in this case, whether a plaintiff *would have* faced substantial difficulties absent the possibility of a contingency enhancement is essentially unknowable when the most critical assumption necessary to make such a counterfactual judgment is itself the issue before the court. *See King*, 906 F.2d at 770 (Williams, J., concurring) ("I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa.").

As Judge Buckley correctly observed in *McKenzie*, if Justice O'Connor's opinion controls the holding of *Delaware Valley II*, we would be obliged to apply the "substantial difficulties" test, notwithstanding these analytical difficulties, "like it or not." *McKenzie*, 875 F.2d at 342 (Buckley, J., concurring in part and dissenting in part). But the difficulties we have described have prompted us to think harder about what the controlling principles of *Delaware Valley II* really are; specifically, we have reconsidered whether we have been correct in assuming that Justice O'Connor's concurring opinion governs the subject of contingency enhancements. We have regarded her concurrence as controlling largely in reliance on the Supreme Court's admonition in *Marks v. United States*, 430 U.S. 188 (1977), that when the Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the "'narrowest grounds'" should be regarded as the Court's holding. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But *Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), for example, the Court interpreted its earlier nine-way split in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). In *Furman*, the five Justices who supported the judgment that Georgia's death penalty statute was unconstitutional produced five separate opinions. Two Justices concluded that the death penalty was unconstitutional in all circumstances. *See id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring). Three others found specific defects in the Georgia statute but declined to decide whether capital punishment might be constitutional under other circumstances. Of these, Justices Stewart and White felt that the Georgia death penalty was unconstitutional because it was applied in an arbitrary and capricious manner, *see id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring), while Justice Douglas stated that it was unconstitutional because it was "pregnant with discrimination," falling more harshly on minorities and the poor both because its application was discretionary rather than mandatory and because wealthy defendants could afford better counsel. *See id.* at 255-57 (Douglas, J., concurring).

In *Gregg*, the Court—in another fragmented opinion—treated the opinions of Justices Stewart and White as controlling. *See Gregg*, 428 U.S. at 169 n.15 (plurality opinion). Justices Marshall and Brennan, who believed the death penalty unconstitutional in all circumstances, surely agreed with Justices Stewart and White that it was unconstitutional when administered in an arbitrary and capricious manner. By the same token, Justice Douglas, who insisted that any discretion in the judge or jury to decide when to impose capital punishment rendered the arrangement unconstitutional, would certainly have subscribed to Justice Stewart's notion that the death penalty could not be administered constitutionally to "a capriciously selected random handful" of criminals. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). Selecting the opinions of Justices Stewart and White as the holding of *Furman* in *Gregg* was thus unproblematic.

Similarly, in *Marks* itself, the Court adopted as the governing definition of obscenity the position of the plurality from the earlier case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413 (1966) (*Fanny Hill*). In *Fanny Hill,* three separate views supported the judgment that the book was not obscene: the view expressed in the plurality opinion, which said that a book had to be "utterly without redeeming social value" to be considered obscene, *see id.* at 419 (opinion of Brennan and Fortas, JJ., and Warren, C.J.) (emphasis omitted); the view of Justice Stewart that only "hardcore" pornography could be banned as obscene, *see id.* at 421 (opinion of Stewart, J.); and the view of Justices Black and Douglas, who believed that obscenity could never be banned. *See id.* at 421 (opinion of Black, J.); *id.* at 433 (opinion of Douglas, J.). Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' "narrowest grounds" approach yielded a logical result.[6]

When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

The Court itself appears not to apply *Marks* in cases of this type. To take one example, in *Coolidge v. New*

[6]Justice Stewart's "hardcore" test, though it was also a logical subset of Justice Black and Douglas' opinion, would only have spoken for three Justices and could therefore not have been the controlling rationale.

Hampshire, 403 U.S. 443 (1971), a plurality of four Justices held that only when evidence was discovered "inadvertently" could it be seized pursuant to the plain view exception to the Fourth Amendment's warrant requirement. *See id.* at 469 (plurality opinion). Four other Justices believed that inadvertence was not necessary for a valid seizure of evidence in plain view. *See id.* at 492 (Burger, C.J., concurring in part and dissenting in part); *id.* at 506 (Black, J., concurring in part and dissenting in part); *id.* at 510 (Blackmun, J., concurring in part and dissenting in part); *id.* at 516 (White, J., concurring in part and dissenting in part). Justice Harlan concurred in the judgment that the search in question was unconstitutional but provided no reasoning by which one could discern his position on the inadvertence requirement. *See id.* at 490 (Harlan, J., concurring in the judgment). The Court subsequently stated that the inadvertence requirement was "not a binding precedent" and was merely "the considered opinion of four Members of this Court" that should be "the point of reference for further discussion of the issue." *Texas v. Brown,* 460 U.S. 730, 737 (1983) (plurality opinion). The Court eventually disavowed the inadvertence requirement entirely. *See Horton v. California,* 110 S. Ct. 2301, 2308-10 (1990).

It seems to us that *Delaware Valley II* is one of the fragmented opinion cases that cannot be resolved satisfactorily by *Marks.* Unlike *Furman* or *Fanny Hill, Delaware Valley II* is not a case in which the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position. In other words, it is not a case in which there is an implicit majority of the Court. Rather, *Delaware Valley II* involves three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices.

Superficially, to be sure, there is a common link between the plurality opinion and Justice O'Connor's concurrence; both Part V of the plurality opinion and Justice O'Connor seem to endorse the substantial difficulties test

we sought to apply earlier in this opinion. But the plurality quite clearly indicated in Part IV that it did not believe that contingency enhancements were ever available. *See Delaware Valley II,* 483 U.S. at 727 (plurality opinion). Therefore, Part V appears to have been composed not as an alternative holding but rather as a fallback position, an invitation, as it were, to Justice O'Connor to reach common ground. Since Justice O'Connor did not accept the plurality's invitation, explicitly declining to join Part V, the plurality's true position remains that expressed in Part IV.

Justice O'Connor does appear to accept the bare concept that contingency enhancements should not be awarded unless the plaintiff shows substantial difficulties, but it is far from clear, as we noted earlier, what content she would give to the "substantial difficulties" test the plurality articulates in Part V. Her concurrence does not contain enough independent reasoning on the question of availability to allow us to compare her position analytically to that of the plurality. In that sense, her opinion on that issue approaches Justice Harlan's in *Coolidge.*

Even if it were possible to determine from Justice O'Connor's opinion *when* to apply a contingency enhancement and to conclude that her views on that subject were somehow narrower than the plurality's, it is quite clear that one could not say in the *Marks* sense that her carefully explained view of *how* the contingency enhancement should be calculated is narrower than the plurality's answer to that question. The plurality in Part IV stated that if an upward adjustment for contingency risk were applied, the amount should be based on the "real risk-of-not-prevailing" in the case—but as a general rule should be "no more than one-third of the lodestar." *Id.* at 730. Justice O'Connor, on the other hand, takes a different approach altogether, one that does not vary with the riskiness of the individual case but rather is based on a class determination of the amount of contingency enhancement usually paid in the relevant market, with no explicit ceiling. *See id.* at 731-34 (O'Connor, J. concurring in part and

concurring in the judgment). We do not see how either approach can be thought "narrower" than the other; they are simply different.

To apply *Marks* to *Delaware Valley II,* we would have to conclude that Justice O'Connor's answers to both the "when" and the "how" questions were "narrower" than the plurality's in Part V. Without implicit agreement on both, it is simply impossible to regard the substantial difficulties test as controlling. Of course, as we have recognized, how one calculates a contingency enhancement could be thought to be a separate analytic issue from the question whether and under what circumstances a contingency enhancement is available. But as the panel opinion and other cases demonstrate, the two questions tend to run together. *See King,* 906 F.2d at 765-68; *McKenzie,* 875 F.2d at 334-37; *Student Pub. Interest Research Group v. AT & T Bell Laboratories,* 842 F.2d 1436, 1451 (3d Cir. 1988). It is very difficult to consider the circumstances under which a contingency enhancement is "necessary" to attract counsel without contemplating the amount of the enhancement; each part of the inquiry has inevitable ramifications for the other. This may be the reason Justice O'Connor's opinion focuses so heavily on the "how" question. Because her answer to that question is so clearly at odds with that of the plurality, however, we are left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II.*

The Third Circuit, taking a different approach, has reasoned that Justice O'Connor's opinion can be regarded as a subset of the dissent if not the plurality. As such, Justice O'Connor's concurrence would speak for a majority of the Court. *See id.* ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court."). The Third Circuit appears to apply the *Marks* methodology to reach this result, but it does not explicitly rely on *Marks. See id.* at 1451 n.16 (citing *Marks* as a "see also" in a footnote appended to the citation of a circuit opinion). This is understandable,

because *Marks* has never been so applied by the Supreme Court, and we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority. As the Court said in *Marks* itself, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by *those members who concurred in the judgments* on the narrowest grounds.'" *Marks,* 430 U.S. at 193 (quoting *Gregg,* 428 U.S. at 169 n.15 (opinion of Stewart, Powell, and Stevens, JJ.)).

To be sure, in *Vasquez v. Hillery,* 474 U.S. 254 (1986), the Supreme Court, in interpreting *Rose v. Mitchell,* 443 U.S. 545 (1979), emphasized that an opinion that combines shifting majorities in various portions is no less binding than would be an opinion in which the same Justices formed the majority for all the sections. *See Vasquez,* 474 U.S. at 261-62 n.4; *see also Arizona v. Fulminante,* 111 S. Ct. 1246 (1991) (employing two distinct majorities to arrive at a judgment, both of which therefore constitute binding law). That, however, is quite a different situation than the one that the *Marks* methodology addresses, where there is no explicit majority agreement on all the analytically necessary portions of a Supreme Court opinion. Under these latter circumstances, if the application of *Marks* will not yield a majority holding, nothing will.[7]

To say that *Delaware Valley II* provides no controlling legal holding is not to say that it has no binding impact on us. Because the Court's result was to deny a contin-

[7]In our view, even applying the Third Circuit's reasoning, we do not think Justice O'Connor's concurrence constitutes a controlling opinion in *Delaware Valley II.* For similar reasons to those we outlined in our discussion as to whether her opinion could be thought narrower than the plurality opinion, Justice O'Connor's thoughtful answer to the question of how to calculate a contingency enhancement should it be available cannot possibly be thought a subset of the dissent's approach to the same issue. She herself recognizes this. *See Delaware Valley II,* 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment).

gency enhancement without even a remand, we think we could not authorize the routine awarding of contingency enhancements of whatever size. *Cf. National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (noting that the result is binding even when the Court fails to agree on reasoning). We furthermore believe, as this opinion and the dissent make clear, that there simply is no practical middle ground between providing enhancements routinely and not providing them at all. Keeping in mind that a majority of the Supreme Court clearly agrees that the question of attorney's fees must not turn into major litigation in itself, *see Delaware Valley II,* 483 U.S. at 722, we think the appropriate course is to hold that contingency enhancements will not be available in this Circuit.[8] We note that although other circuit courts have set forth various tests for awarding contingency enhancements under *Delaware Valley II,* most of the tests appear to be difficult, if not impossible, to meet in practice. *See, e.g., Student Pub. Interest Research Group v. AT & T Bell Laboratories,* 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Craig v. Secretary, Dep't of Health and Human Servs.,* 864 F.2d 324, 327 (4th Cir. 1989) (no contingency enhancement available "in the absence of exceptional circumstances"); *Leroy v. City of Houston,* 831 F.2d 576, 583 (5th Cir. 1987) (contingency enhancements should be "reserved for 'exceptional cases'" (citation omitted)); *Skelton v. General*

[8]The dissent's reliance on the legislative history of 42 U.S.C. § 1988—particularly citations to *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974)—comes too late. The Supreme Court has, on several occasions, indicated that it does not regard factors listed separately in *Johnson* as appropriate enhancements to the lodestar. *See Blum v. Stenson,* 465 U.S. 886, 898-99 (1984); *Delaware Valley I,* 478 U.S. 546, 564, 566 (1986). And the dissent's citation of *Blanchard v. Bergeron,* 489 U.S. 87 (1989), is also misplaced. There the Supreme Court was dealing with an entirely different issue—the question whether an actual, private contingency fee arrangement limited a statutory award, not whether a contingency factor should be added to the lodestar.

Motors Corp., 860 F.2d 250, 254 (7th Cir. 1988) (contingency enhancements available only if plaintiffs meet "stringent requirements"); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991) ("[E]nhancement is reserved for 'rare' and 'exceptional' cases ...."); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) (quoting plurality's view that "enhancement for the risk of nonpayment should be reserved for exceptional cases"); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate ...."). *But cf. D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990) (implying that routine contingency enhancements might be justified).

We have done our best to apply *Delaware Valley II* but have been unable to derive a governing rule from the opinion. Considering our struggle to understand and apply *Delaware Valley II* as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position.

* * * *

For the foregoing reasons, we overrule *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), and those portions of our other previous opinions inconsistent with our current disposition, and reverse the contingency enhancement portion of the attorney's fees allowed to appellant.

It is so ordered.

EDWARDS, *Circuit Judge*, with whom MIKVA, *Chief Judge*, WALD and RUTH B. GINSBURG, *Circuit Judges*, join, *dissenting*: In deciding this appeal, we are constrained to apply a specific statutory provision, section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), under which the District Court has broad authority to assess the reasonableness of a fee request. In the absence of legal error, the trial judge's determination as to reasonableness may not be disturbed unless it is an *abuse of discretion*. Given this highly deferential standard of review, there is no legitimate basis whatsoever for this court to overturn the judgment of the trial judge on the facts of this case.

Furthermore, the majority's new rule, that contingency awards are never justified, is completely without foundation. Twelve other circuits have reviewed the question at hand, and not one other circuit has adopted a rule that completely bars contingency enhancements.

The plaintiff, Mable King, was awarded an attorney's fee pursuant to section 706(k), which reads, in pertinent part, as follows:

> In any action or proceeding under this subchapter the court, *in its discretion*, may allow the prevailing party ... *a reasonable attorney's fee* as part of the costs [of bringing the action] ....

42 U.S.C. § 2000e-5(k) (1988) (emphasis added). As may be seen from the clear terms of the statute, the "district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984). The Supreme Court has *emphasized* that it is entirely "appropriate" that the trial judge have broad authority in determining the amount of a fee award "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[1]

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[1] *See also Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) ("It is central to the awarding of attorney's fees ... that the district

In this case, the District Court awarded an attorney's fee that compensates Ms. King's counsel for the risk of having taken the case on a contingent-fee basis. In reaching its conclusion that a 50% enhancement over normal hourly rates was "reasonable" compensation in this case, the District Court properly looked to evidence of prevailing market practices to ensure that the fee award was roughly commensurable with what counsel could obtain on the open market. There is no doubt, given the language of the statute, that the District Court's judgment in this regard is to be reviewed under a highly deferential, abuse-of-discretion standard. *See Blum,* 465 U.S. at 896; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 569 (1986) ("*Delaware Valley I*") (Blackmun, J., concurring in part and dissenting in part); *City of Riverside v. Rivera,* 477 U.S. 561, 586 (1986) (Powell, J., concurring in the judgment). Under this standard of review, we are not to substitute our judgment of what is "reasonable" for that of the District Court; rather, we are to review the trial court's judgment only to ensure that it is not founded upon an error of law or a clearly erroneous finding of fact and that there is some evidence in the record upon which the court "rationally could have based its decision." *Heat & Control, Inc. v. Hester Indus., Inc.,* 785 F.2d 1017, 1022 (Fed. Cir. 1986); *see also Founding Church of Scientology of Washington, D.C., Inc. v. Webster,* 802 F.2d 1448, 1457 (D.C. Cir. 1986) ("The abuse-of-discretion standard calls on the appellate department, in a spirit of humility occasioned by not having participated in what has gone before, not just to scrutinize

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court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case.").

Although some of these precedents focus upon the parallel fee-shifting provision set out in the Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *codified at* 42 U.S.C. § 1988 (1988), Congress and the Supreme Court have made clear that the fee-shifting provisions of that statute and Title VII are to be interpreted alike. *See Hensley,* 461 U.S. at 433 n.7; S. REP. No. 1011, 94th Cong., 2d Sess. 4 (1976).

the conclusion but to examine with care and respect the process that led up to it."), *cert. denied,* 484 U.S. 871 (1987); *Gomez v. Chody,* 867 F.2d 395, 405 (7th Cir. 1989) (" 'To find an abuse of discretion, we must conclude that "no reasonable [person] ... could agree with the district court." ' ") (quoting *Mumford v. Bowen,* 814 F.2d 328, 329 (7th Cir. 1986)).

Notwithstanding the latitude vested by Congress in trial courts to craft "reasonable" fee awards, the District of Columbia ("Government") defendants in this case urge this court to substitute its judgment for that of the trial judge in overturning the award of fees. In following this suggestion, the majority seizes upon the "substantial difficulties" test found in *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air,* 483 U.S. 711, 731 (1987) ("*Delaware Valley II*"); *id.* at 733 (O'Connor, J., concurring in part and concurring in the judgment), which purports to measure risk enhancement pursuant to prevailing "market" rates in the relevant legal community. The majority, however, turns the test on its head by converting it to a test whereby an individual plaintiff must establish that she personally encountered difficulty securing competent representation without the promise of a contingency enhancement. The problem with this result, however, is that it defies the premise upon which it is based. If there is a "substantial difficulties" requirement under section 706(k), it does *not* seek to determine whether a particular plaintiff "actually faced substantial difficulty in retaining counsel." *Morris v. American Nat'l Can Corp.,* 941 F.2d 710, 715 (8th Cir. 1991) (citing *McKenzie v. Kennickel,* 875 F.2d 330, 337-38 (D.C. Cir. 1989); *see* 875 F.2d at 338 ("Justice O'Connor's opinion instructs us to adopt a class-wide view of contingent cases; if the unavailability of risk enhancements would have caused plaintiffs to have experienced 'substantial difficulty' in locating counsel, then, notwithstanding the particular circumstances of their case, such an enhancement may be granted.")). Therefore, the trial judge surely did not abuse his discretion in failing to apply the majority's distorted construc-

tion of the so-called "substantial difficulties" test. There is no "actual difficulties" requirement under section 706(k), and this court has no authority to amend the statute to include such a restriction.

Just recently, in rejecting a claim for expert fees as a part of a claim for attorney's fees, the Supreme Court reminded us that we must enforce fee statutes as written. On this point, Justice Scalia, borrowing a well-known passage from an opinion by Justice Brandeis, said:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

West Va. Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991) (quoting *Iselin v. United States,* 270 U.S. 245, 250-51 (1926)). In first utilizing an actual difficulties gloss to section 706(k), and then completely barring contingency enhancements, the majority opinion in this case "transcends the judicial function." Because there is nothing in the statute or the relevant Supreme Court case law that would support the majority's conclusion, we dissent.

I.

By now, it should be beyond dispute that the fee-shifting provision of Title VII permits district courts to enhance time-based fee awards to take account of the fact that an attorney has taken a case on a contingent-fee basis. It is, of course, true that, in determining what is "a reasonable attorney's fee" in any given case, the trial judge normally begins by calculating the prevailing attorney's so-called "lodestar" fee. As the Supreme Court has explained:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an

> objective basis on which to make *an initial estimate* of the value of a lawyer's services.

Hensley, 461 U.S. at 433 (emphasis added). This calculation, however, is only a "starting point" and "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . . ." *Id.* at 434; *see also Blanchard v. Bergeron,* 489 U.S. 87, 94 (1989); *Blum,* 465 U.S. at 888 ("[a]djustments to that [lodestar] fee then may be made as necessary in the particular case").

Among these "other considerations," it appears quite certain that Congress intended that the courts would take into account whether a lawyer had taken a case on a fixed- or contingent-fee basis. This can be inferred from Congress' approving citation of a 1974 Fifth Circuit decision, *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), which included the contingent nature of payment among 12 factors that trial courts should consider in calculating fee awards. *See* S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8-9 (1976); *see also Blum,* 465 U.S. at 902-03 (Brennan, J., concurring) (Congress' approval of *Johnson* and related cases makes it "clear . . . that Congress authorized district courts to award upward adjustments to compensate for the contingent nature of success"). "*Johnson*'s 'list of 12,'" the Supreme Court has often observed, "provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees . . . ." *Blanchard,* 489 U.S. at 93; *see also Hensley,* 461 U.S. at 429-30, 434 n.9 (looking to Fifth Circuit's *Johnson* opinion in determining congressional intent with regard to fee awards); *Blum,* 465 U.S. at 893-95 (same); *id.* at 902-03 (Brennan, J., concurring) (same).

Apart from these indications of congressional intent, the Supreme Court also has acknowledged the propriety of considering the uncertainty of payment in calculating a fee award. Five Justices undoubtedly agreed in *Delaware Valley II* that "Congress did not intend to fore-

close consideration of contingency in setting a reasonable fee under fee-shifting provisions" such as that found in Title VII. 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 739 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) ("Congress envisioned that district courts would take the fact of contingency into account when calculating a reasonable attorney's fee"). Two years later, in *Blanchard,* the Court held that, while a plaintiff's contingent-fee contract with her attorney is by no means dispositive of a subsequent judicial assessment of "a reasonable attorney's fee" in a case, "[t]he *Johnson* contingency-fee factor *is* ... a factor." 489 U.S. at 93 (emphasis added).

Moreover, perhaps the one rule that has emerged more clearly than any other from the Supreme Court's pronouncements in this area is that court-ordered attorney's fees are to reflect prevailing market rates and practices. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded [by a court] ... are to be based on market rates for the services rendered."); *Blum,* 465 U.S. at 895 ("The statute and legislative history establish that 'reasonable fees' ... are to be calculated according to the prevailing market rates in the relevant community ...."); *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). In this way, court-ordered fees will track market forces, fulfilling the congressional purpose of ensuring that attorneys will be available to prosecute Title VII cases and vindicate the fundamental national policies embodied in that statute. *See Jenkins,* 491 U.S. at 283 n.6; *Blum,* 465 U.S. at 903-04 (Brennan, J., concurring); *Hensley,* 461 U.S. at 447 (Brennan, J., concurring in part and dissenting in part).

There should be no controversy in the observation that attorneys in the private legal-services market ordinarily demand somewhat greater compensation in exchange for taking a case on a contingent-fee basis. It appears indisputable that "[l]awyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid[ ] irrespective of whether they win or lose." *Blum,* 465 U.S. at 903 (Brennan, J., concurring); *see also* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. PA. L. REV. 281, 324-25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk."). Thus, commentators and courts have long and widely agreed that, in assessing the fair market value of legal services, both inside and outside the court-ordered fee context, some enhancement is required to compensate for the attorney's assumption of risk in a contingent-fee case. *See, e.g., Copeland v. Marshall,* 641 F.2d 880, 892-93 (D.C. Cir. 1980) (*en banc*); *id.* at 927 (Wilkey, J., dissenting); *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 188 (D.C. Cir. 1974) (adopting *Johnson*'s "list of 12"); 2 M. DERFNER & A. WOLF, COURT ORDERED ATTORNEY FEES ¶ 15.01[2][c], at 15-16 (rev. ed. 1990) ("Most courts realize that where payment of a fee is contingent on success an attorney should receive a larger overall fee than where payment is guaranteed regardless of outcome ....") (footnote omitted); *id.,* ¶ 16.04[4]; S. SPEISER, ATTORNEYS' FEES § 8:10, at 319 (1973) ("The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his services, the courts generally taking the view that a larger fee will be authorized where its payment depends upon the attorney's success than where he is to be paid whether or not his efforts are successful.") (footnote omitted); Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 501 (1981); Berger, *supra,* at 324-26.

Furthermore, it is absolutely clear that the lodestar is not the sole measure of a reasonable attorney's fee. It is true that the Supreme Court has said that "many of the *Johnson* factors," such as " 'novelty [and] complexity of the

issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation[,] are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award," *see Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-900); but, in making this observation, the Court has excluded the consideration of "enhancement of the lodestar[ ] based on the likelihood of success[ ] or . . . the risk of loss" from any presumption that the lodestar represents a reasonable fee, *id.* at 568.[2] Indeed, in *Delaware Valley I*, the Court reserved until *Delaware Valley II* the question of when and to what extent contingency enhancements might be awarded. As indicated earlier, a majority of the Court in *Delaware Valley II* agreed that contingency enhancements may be awarded as a part of a reasonable attorney's fee. In other words, a majority of the Court in *Delaware Valley II* declined to apply any "presumption" that the lodestar normally represents a reasonable fee so as to defeat claims of enhancement based on the likelihood-of-success/risk-of-loss factor.[3]

We recognize that the contingency factor could be accounted for within the initial lodestar calculation. A court could simply enhance the "reasonable" hourly rate used in calculating the lodestar and forgo post-lodestar adjustments. *See, e.g., Copeland*, 641 F.2d at 893 ("To the extent . . . that an hourly rate underlying the 'lodestar' fee

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[2]The Court reiterated the presumptive reasonableness of the lodestar fee in *Blanchard*, but did so there only to rebut the suggestion that a fee arrangement set in a contingent-fee contract should govern as a strict ceiling on a court-ordered fee in the same case. *See* 489 U.S. at 95.

[3]The majority's extended discussion of whether the five votes that adopt this position constitute a binding majority of the Court seems to us overly pedantic, and mostly irrelevant. It is axiomatic that lower court judges routinely consider and weigh the diverse statements in Supreme Court opinions, especially those propositions garnering a majority, to seek guidance in the disposition of subsequent cases. Indeed, that is precisely what our sister circuits have done in construing *Delaware Valley II*.

itself comprehends an allowance for the contingent nature of the availability of fees in Title VII litigation . . . , no further adjustment duplicating that allowance will be made."); *Berger, supra,* at 325-26. This approach is problematic because there really is "no such thing as a market hourly rate in contingent litigation." 2 M. DERFNER & A. WOLF, *supra,* ¶ 16.04[4][a], at 16-100.15. Accordingly, most courts choose to employ "real" hourly rates in the lodestar calculation — *i.e.,* "the normal hourly charge in the community for noncontingent, contemporaneous payment in litigation of similar complexity and difficulty, by a lawyer with similar experience and reputation," *id.,* ¶ 16.03[1][a], at 16-47 (footnotes omitted)[4] — and only later adjust the product upward to account for the contingency factor. *See id.*, ¶ 16.04[4][a], at 16-100.15-.16. The difference in the mathematical formulas makes no difference in the result, of course, so long as the court is careful to avoid "double-counting" by blending the two approaches. *See Copeland,* 641 F.2d at 893. The point here is, however, that under the approach followed by most courts — and followed by the District Court in this case — the contingency factor is *not* subsumed within the initial lodestar calculation; consequently, if the lodestar is not itself adjusted upward, the lawyer's economic risk will go uncompensated.

The majority rejects the prevailing view that enhancements are available because it can find no governing principle in *Delaware Valley II.* With no precedent or logic to support its opinion, the majority simply decides that contingency enhancements never should be permitted. This rule is created completely out of new cloth. Neither the plurality, concurring, nor dissenting opinion in *Delaware Valley II* holds that contingency enhancements are *never* available. In a sweep of reasoning that defies comprehension, the majority attempts to dismiss Part V of Justice

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[4]The Supreme Court acknowledged as much in *Blanchard* when it stated that the lodestar figure is to be derived by "applying *prevailing billing rates* to the hours reasonably expended on successful claims." 489 U.S. at 94 (emphasis added).

White's plurality opinion because Justice O'Connor declined to join this portion of the plurality. But, of course, as is clear from the Court's opinion, Part V remains as written and means what it says: *see, e.g.*, 483 U.S. at 728 ("enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification ... are readily apparent and are supported by evidence in the record and specific findings by the courts"); *id.* at 731 ("[A] fee award should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market."). Whatever substantive criteria these statements may stand for, they certainly do not reflect a *per se* rule against contingency enhancements. In any event, the one thing that is absolutely clear from *Delaware Valley II* is that the Supreme Court *declined* to reject the possibility of contingency enhancements.

Furthermore, the majority in this case, having decided that *Delaware Valley II* does not control interpretation of the fees statute, does absolutely no work to interpret the statute. Rather, the majority relies on the utterly irrelevant proposition that "the question of attorney's fees must not turn into major litigation itself," *see Delaware Valley II*, 483 U.S. at 722, to reach a *per se* rule barring all contingency enhancements. Of course, the majority's fear could be avoided equally well by routinely granting contingency enhancements. Even a test which looks to whether, in the relevant market, contingency fees are needed to induce attorneys to represent plaintiffs in these actions, will not create much hardship after district and circuit courts establish precedent regarding the major markets. Given that the contingency enhancement question merely asks the court to decide the prevailing market for legal services, it is no more onerous than any other fee inquiry.

The majority's result also files in the face of the decisions from *every* circuit that has considered the issue since *Delaware Valley II*. In creating a split in the circuits, the majority now causes the D.C. Circuit to stand oddly alone on this question. Of the thirteen circuits applying *Delaware Valley II*, none — save the D.C. Circuit — has completely ruled out contingency enhancements. *See, e.g., Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of *per se* rule, but because "liability here was so plain ... that, as a practical matter, the risk of not recovering a fee was all but eliminated"); *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) (fee enhancement available when "[w]ithout the possibility of a fee enhancement ... competent counsel might refuse to represent ... clients thereby denying them effective access to the courts") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)); *Kelly v. Matlack*, 903 F.2d 978 (3d Cir. 1990) ("in order to qualify for an enhancement, a plaintiff must establish that without adjustment it would have faced substantial difficulties in finding counsel in the ... relevant market") (citations omitted); *Craig v. Dep't of Health & Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) (dicta) (reading *Delaware Valley II* to permit fees in "exceptional circumstances"); *Alberti v. Klevenhagen*, 896 F.2d 927, 936 (5th Cir.) (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*"), *reh'g granted in part*, 903 F.2d 352 (5th Cir. 1990); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991) ("This court has upheld multipliers for the risk of non-compensation in contingent-fee cases subsequent to *Delaware Valley*.") (citing *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988)); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991) (following Justice O'Connor's test as the *Delaware Valley II* "holding"); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991) ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements.... We are persuaded that the district court

abused its discretion in concluding that [plaintiff] failed to establish that she would have faced substantial difficulties in retaining counsel absent risk enhancement."); *Bouman v. Block,* 940 F.2d 1211, 1235-36 (9th Cir. 1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test), *petition for cert. filed,* 60 U.S.L.W. 3344 (Nov. 5, 1991); *Smith v. Freeman,* 921 F.2d 1120, 1123 (10th Cir. 1990) (quoting the *Delaware Valley II* plurality that "enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts"); *Martin v. University of South Alabama,* 911 F.2d 604, 610-12 (11th Cir. 1990) (following Justice O'Connor's test); *Crumbaker v. Merit Systems Protection Board,* 827 F.2d 761, 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary to bring the fee within a range that would attract competent counsel").

Additionally, despite the majority's assertion that the tests developed in many circuits are "difficult, if not impossible, to meet," even courts of those circuits have continued to award contingency enhancements in some circumstances. *See, e.g., Morris v. American Nat'l Can Corp.,* 941 F.2d 710, 716 n.2 (8th Cir. 1991); *Curry v. Contract Fabricators Inc. Profit Sharing Plan,* 891 F.2d 842, 849-50 (11th Cir. 1990); *Shirley v. Chrysler First, Inc.,* 763 F. Supp. 856, 860 (N.D. Miss. 1991); *Vargas v. Calabrese,* 750 F. Supp. 677 (D.N.J. 1990); *Bauman v. Jacobs Suchard, Inc.,* No. 89 C 5452, 1991 U.S. Dist. LEXIS 8847 (N.D. Ill. 1991).

Thus, setting aside the more contentious question of what degree of enhancement is appropriate, there ought to be no dispute that *some* upward adjustment of the lodestar fee is permissible where the prevailing attorney assumed the greater risk inherent in contingent-fee cases. There is simply no justification — in the statute, in the case law or in common sense — for the suggestion that

contingent-fee lawyers may not be fully compensated for their services.

II.

With regard to the particular facts of this case, there is no basis under the abuse-of-discretion standard of review to overturn the District Court's decision to allow a 50% enhancement of the lodestar fee submitted by Ms. King's counsel. Although the Supreme Court's guidance concerning the appropriate method for *calculating* a contingency adjustment has been regrettably uncertain, the trial court's decision in this case is consistent with what standards can be gleaned from recent cases.

The clearest instruction found in the Supreme Court's cases is that fee awards must be tied to evidence of the fee practices prevailing in the local legal market. *See, e.g., Jenkins,* 491 U.S. at 283, 285; *Blum,* 465 U.S. at 894-95; *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). That was done in this case. In reaching its determination, the District Court expressly relied upon attorney affidavits filed by the plaintiff and an earlier decision in the same district in which another trial judge had found that "attorneys in the Washington[,] D.C.[,] community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." *See Palmer v. Shultz,* 679 F. Supp. 68, 74 (D.D.C. 1988), *quoted in King v. Palmer,* Civ. Action No. 83-1980, mem. op. at 4 (D.D.C. Sept. 20, 1988).

Another way to assess the reasonableness of the fee amount awarded by the District Court is pursuant to the two-prong test set forth in Justice O'Connor's concurring opinion in *Delaware Valley II.* Although it is unclear what precedential force that opinion should be given, *cf. Marks v. United States,* 430 U.S. 188, 193 (1977), it is nonetheless a source of some guidance and it is further indication

that the judgment of the District Court should be affirmed in this case. Under the first prong of Justice O'Connor's test, lower courts would be required to "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment). Under the second prong, "the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency." *Id.* Under this second prong, "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* (quoting from plurality opinion, 483 U.S. at 731).

Under the first prong of Justice O'Connor's test, the District Court here reasonably concluded that "the relevant market" does in fact compensate lawyers for assuming the risk of contingent payment. In addition to the evidence cited in *Palmer v. Shultz,* which went directly to the degree to which the Washington, D.C., legal market customarily compensates for contingency, the court had before it several dozen affidavits from local attorneys swearing either that they generally demand an enhancement over normal hourly rates in order to accept contingent-fee cases or that they refuse such cases altogether because of the risk involved.

Under the second prong of Justice O'Connor's test, Ms. King was required to show that she "would have faced substantial difficulties in finding counsel" had contingency enhancements *not* been customarily available in the Washington, D.C., legal market. This proposition, of course, turning as it does on a counterfactual supposition, is difficult to prove. Nonetheless, Ms. King produced an affidavit from her attorney stating that he would not have taken her case without the prospect of a fee enhancement. *See* Declaration of Robert M. Adler at 2 (Sept. 11, 1987), *reprinted in* Joint Appendix ("J.A.") 74, 75. In addition, she produced further affidavits from several Washington,

D.C., Title VII plaintiffs' attorneys corroborating that Ms. King likely would have faced substantial difficulties securing counsel without the promise of a contingency premium.[5] These attestations were reinforced by others documenting the general unwillingness of local attorneys to accept such cases absent some likelihood of receiving an enhancement for risk. On this record, we believe that Ms. King carried her burden under both prongs of Justice O'Connor's test.

Because Title VII and the governing case law clearly permit trial courts to enhance attorney's fees to compensate for the risk of contingent payment, and because the facts of the instant case satisfy whatever standards can be gleaned from recent Supreme Court cases, it cannot be found that the District Court abused its discretion in shaping the fee award in this case. As we noted at the outset, the standard of review in this case is *abuse of dis-*

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[5] In one affidavit, attorney George Chuzi stated:

> During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis (even had she agreed to pay up to $5,000 in legal fees). The only way in which I believe that a competent Title VII attorney would have been convinced to seriously consider this representation was if there was a reasonable possibility of receiving an enhanced fee for risk (over and above hourly rates) if Mrs. King prevailed.

Supplemental Declaration of George M. Chuzi at 2 (Dec. 21, 1987), *reprinted in* J.A. 130, 131; *see also* Declaration of David R. Cashdan at 4 (Apr. 25, 1986) ("I believe that it is highly unlikely that I would have agreed to act as sole counsel in this case."), *reprinted in* J.A. 112a, 112d; Declaration of Robert B. Fitzpatrick at 2 (Apr. 24, 1986) ("I believe that the chances of prevailing in this case . . . were so remote that my firm would not have accepted representation of Mrs. King."), *reprinted in* J.A. 173a, 173b; Declaration of Barry H. Gottfried at 2 (July 31, 1987) ("Had the plaintiff sought to retain me to represent her by filing a suit for the claims involved herein I do not believe that I would have accepted representation."), *reprinted in* J.A. 176, 177.

cretion. The majority, however, has simply ignored the constraints of appellate review in second-guessing the findings of the trial judge. Indeed, the majority's approach in this case borders on *de novo* review, in flat defiance of the Supreme Court's instruction that "[i]t is central to the awarding of attorney's fees ... that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard,* 489 U.S. at 96.

III.

The fundamental problem with this case, as with other fee cases, is that the Supreme Court has yet to give us coherent guidance about how to determine the reasonableness of fee awards under Title VII and similar fee-shifting statutes. In this, we share the majority's frustration, if not its solution. In particular, we do not yet know under what circumstances to award a contingency enhancement, nor do we know whether the degree of enhancement allowed by the courts merely *reflects* prevailing market rates or actually *creates* the relevant market forces by defining the extent to which economic risk will be compensated.[6] In our view, the proper answers to these questions ultimately must come from Congress.

Logically, of course, the size of a contingency enhancement should be determined in each case according to the degree of risk actually incurred by the prevailing attorney. It is impossible to determine with any confidence what a "reasonable fee" would be in any particular contingency case without first assessing just how much risk the

[6]For example, as Judge Williams has pointed out, if courts generally allow a contingency enhancement of 50%, lawyers will have an economic incentive to bring only those cases in which the odds of succeeding on the merits are at least two-to-one; if the court-ordered enhancement figure rises to 100%, lawyers will presumably bring any case in which the chances of winning are at least 50%. *See King v. Palmer,* 906 F.2d 762, 770 (D.C. Cir.) (Williams, J., concurring in panel decision), *vacated & reh'g en banc granted,* 906 F.2d 772 (D.C. Cir. 1990).

plaintiff's lawyer actually assumed.[7] *See, e.g.,* S. SPEISER, *supra,* § 8:10, at 320; Berger, *supra,* at 326. In this regard, the Court's apparent disapproval of case-by-case risk assessment, *see Delaware Valley II,* 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 745-46 (Blackmun, J., dissenting), serves only to frustrate the lower courts as they struggle to shape fee awards that, consistent with legislative purpose, will be "adequate to attract competent counsel" while stopping short of "produc[ing] windfalls" for plaintiffs' lawyers, *see Blum,* 465 U.S. at 897 (quoting S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976)).

Although we share Justice O'Connor's concern that risk enhancements not be calculated or awarded in "an arbitrary or unjust" manner, *Delaware Valley II,* 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment), our experience suggests that the two-prong test enunciated in the concurring opinion in *Delaware Valley II* cannot be applied without difficulty. The panel

[7]In this respect, a risk enhancement arguably should not encompass hours of labor for which compensation was secure. In the instant case, the argument could well be made that the risk of nonpayment incurred by Ms. King's counsel virtually vanished after this court decided the merits in Ms. King's favor in 1985. In *King v. Palmer,* 778 F.2d 878 (D.C. Cir. 1985), this court reversed the District Court's entry of judgment for the defendants and remanded the matter with instructions "to enter judgment for Ms. King and to determine an appropriate remedy." *Id.* at 882 (footnote omitted). "At a minimum," we noted, "it appears that the appropriate remedy in this case should include the promotion of Ms. King ..., her receipt of back pay, and a full consideration of any further relief." *Id.* at 882 n.7. Once Ms. King prevailed on the merits of her main claim, the defendants recognize, she qualified for an award of fees for "hours reasonably expended [thereafter] on remedial and similar ancillary matters." *See* Brief for Appellees/Cross-Appellants at 39. At least once it was established that there would be no review of the merits in the Supreme Court, there remained no risk of nonrecovery. Accordingly, the District Court probably could have, within the bounds of its discretion, eliminated from the risk-enhancement calculation fees for post-1985 work for which lodestar payment was certainly due.

opinions in this case and in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), illustrate the two dilemmas inherent in this test. First, although the affidavits in both cases clearly establish that lawyers routinely demand the equivalent of a significantly higher hourly fee if they accept a case on a contingent-fee basis, those same affidavits also demonstrate that there is no one "market rate" or contingency fee arrangement for all such cases.[8] Instead, lawyers predictably evaluate the case of each potential client independently and decide whether to accept representation and what to charge based on their estimation of the likelihood of success and the amount of fees they will receive if they do, in fact, prevail.[9] Consequently, it is arguably unrealistic to assume that a court can determine one specific level of enhancement that the market demands in contingent-fee cases "as a class."

Second, the so-called "substantial difficulties" test is a confusing and potentially mischievous requirement. For example, the requirements that the court determine the amount of enhancement by looking at contingency cases as a class, and that it look at the circumstances of the particular case only to determine if the plaintiff would have had substantial difficulty in obtaining counsel without the enhancement, force trial judges to award contingency enhancements on an all-or-nothing basis. The judge

[8]To the contrary, lawyers claimed to demand contingency enhancements from 33% to 300% of their regular hourly rates. Other lawyers did not specify a percentage, saying only that they needed a "reasonable" risk enhancement to accept a Title VII case on a contingent basis.

[9]As a result, the lawyer and client may tailor the terms of the contract to address the risks and potential rewards involved in each case. *See, e.g.*, Declaration of Nora A. Bailey at 2 (Aug. 12, 1987), *reprinted in* J.A. 82, 83; Declaration of John R. Erickson at 2 (Nov. 16, 1987), *reprinted in* J.A. 168, 169; Declaration of Chester T. Kamin at 2-3 (Aug. 24, 1987), *reprinted in* J.A. 193, 194-95; Affidavit of David N. Webster at 6 (Sept. 20, 1982) ("The greater the uncertainty of result, the greater the percentage fee may be, albeit always within the limit of reasonableness."), *reprinted in* J.A. 289, 294.

must either award the supposed "market" risk enhancement or no enhancement at all; there is no leeway for the court to decide that some enhancement is appropriate, but that it should be less than the previously determined "market" rate. Although the awards calculated by this method are concededly uniform, they may be nonsensical insofar as they overcompensate some plaintiffs with not-so-risky cases while inadequately compensating others with especially risky ones.

Consequently, we believe that district judges, in enhancing the lodestar to account for the risk of nonpayment, should have the same discretion that they have in determining other components of the reasonable fee. Although no one formula can be devised for all cases, we think that district courts should consider both the size of the attorney's investment in the case and the likelihood that that investment would not be recouped. For one thing, in determining whether a contingency enhancement is necessary to enable the plaintiff to secure counsel, the court could consider the amount that the lawyer would lose if the plaintiff did not prevail. *See Delaware Valley II*, 483 U.S. at 747-48 & n.12 (Blackmun, J., dissenting); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613-14 (1st Cir. 1985). The court thus might consider factors such as

> what, if any, payment the attorneys would have received had the suit not been successful; what, if any, costs or expenses the attorneys would have incurred if the case had been lost; the extent to which the attorneys were required to compensate associates and to carry overhead expenses without assurance of compensation; and whether other attorneys refused to take the case because of the risk of nonpayment.

Delaware Valley II, 483 U.S. at 748 n.12 (Blackmun, J., dissenting). In our view, contingency enhancements are appropriate if the lawyer has to expend a substantial amount of her time and resources to litigate a case and there is a significant risk of not prevailing (and thus of not recouping her investment).

For another thing, the court could consider the plaintiff's likely "ability to prove liability and damages . . . [and the legal precedent] either in favor of or against the theories put forth in the case" in order to determine the magnitude of the risk that the plaintiff would not prevail. *See Wildman*, 771 F.2d at 612. We recognize that it is impossible to determine such risk with any mathematical precision, and we are cognizant of the supposed ethical tensions such calculations may engender,[10] but we do

[10]The plurality summarized these concerns in *Delaware Valley II*:

> [E]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case, and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or "allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish."

483 U.S. at 721-22 (quoting Leubsdorf, *supra*, at 483). The latter of these concerns is, of course, not an attorney-client conflict at all, but simply a strategic dilemma for the defendant of the sort that is not unknown in litigation. To the extent that the first represents a genuine potential for attorney-client conflict, we are reassured by the confidence the Supreme Court has previously expressed for lawyers' ability to put their clients' interests ahead of their own. *See Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986) ("Although respondents contend that Johnson, as counsel for the class, was faced with an 'ethical dilemma' when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do not believe that the 'dilemma' was an 'ethical' one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.") (footnote omitted; emphasis in original). If a lawyer can be trusted to serve his client faithfully at the cost of his entire statutory fee award, we feel sure he can be trusted to do so at the cost of some potential diminution of it.

think that a district court judge, who is familiar with the factual and legal development of the case, can differentiate — after the fact — among cases based on the probability of success in the beginning. As the plurality in *Delaware Valley II* recognized, in some cases there is very little risk of not prevailing, and no enhancement for contingency, or only a very small one, should be awarded.[11] In other cases, the risk of not prevailing would be substantial and the enhancement should be correspondingly enlarged.[12]

In the absence of further guidance in this area from Congress or the Supreme Court, however, we would adhere to the only secure legislative directive available to us — that assessments of what constitutes a "reasonable attorney's fee" are to be left to the sound and reasoned discretion of trial judges. A decade ago, this court, sitting *en banc*, acknowledged the inherent lack of certainty in this enterprise but concluded that such determinations were nonetheless best left, as Congress intended, with trial judges:

> To the district court judge falls the task of calculating as closely as possible a contingency adjustment with which fairly to compensate the successful attorney. We have not . . . lost sight of the fact that this adjustment is inherently imprecise and that certain estimations must be made. For example, it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful. Thus, we ask only that the district court judges exercise their discretion as conscien-

[11]The plurality in *Delaware Valley II* voted to reverse the 50% risk enhancement of lodestar fees incurred to enforce a consent decree in part because there was not "a real risk of not persuading the District Court to enforce its own decree." 483 U.S. at 730.

[12]In saying that the district court should have the discretion to tailor the contingency enhancement to the particular case, we are not saying that the experience of other similarly situated plaintiffs can be disregarded. To the contrary, we think that the success rate of other plaintiffs who have filed suits based on similar legal theories is a good indicator of the risk presented in the case.

tiously as possible, and state their reasons as clearly as possible.

Copeland, 641 F.2d at 893 (footnote omitted).[13] We can perceive no reason to depart from that conclusion today. Because we discern nothing in the District Court's judgment that would suggest an abuse of discretion justifying reversal, and nothing at all supporting the majority's new legal rule, we dissent.

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[13]The court further observed:

> The setting of contingency adjustments is particularly within the expertise of the District Judge. As the Supreme Court said long ago, the District Court "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees v. Greenough*, 105 U.S. 527, 537, 26 L.Ed. 1157 (1882).

Copeland, 641 F.2d at 893 n.24.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 17, 1989 Decided June 26, 1990

No. 89-7027

MABEL A. KING, APPELLANT

v.

JAMES F. PALMER, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, *et al.*

No. 89-7028

MABEL A. KING

v.

JAMES F. PALMER, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 83-1980)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Robert M. Adler for appellant/cross-appellee Mabel A. King. *Joel P. Bennett* also entered an appearance for Mabel A. King.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid,* Senior Acting Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief, for appellees/cross-appellants Palmer, *et al. Susan S. McDonald* also entered an appearance for Palmer, *et al.*

Before EDWARDS, BUCKLEY, and WILLIAMS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Concurring opinion filed by *Circuit Judge* WILLIAMS.

BUCKLEY, *Circuit Judge*: These appeals arise from a dispute over attorney's fees sought by Mabel A. King, the prevailing party in a Title VII lawsuit against the District of Columbia and James F. Palmer, Director of the D.C. Department of Corrections (collectively, the "District" or "District of Columbia"). King was represented throughout her lawsuit by counsel on a contingent fee basis. Following judgment on the merits, the district court awarded King attorney's fees and costs, as well as an enhancement for the risk of nonpayment equal to fifty percent of the fees for which counsel was at risk. The District of Columbia contends that *no* enhancement was proper, or alternatively that the level of enhancement should have been only twenty-five percent or less. On the basis of prevailing practice in the Washington, D.C. legal market, we hold that King was entitled to a 100 percent enhancement of the amount of attorney's fees at risk. That enhancement, however, may not be awarded on time devoted to the litigation of fee awards.

I. BACKGROUND

Mabel King initiated this suit against her employer, the District of Columbia, in July 1983 in order to obtain relief from gender-based discrimination. In September 1984, the

district court entered judgment for defendants. On appeal, this court reversed and remanded, instructing the district court to enter judgment for King and to determine an appropriate remedy. *King v. Palmer,* 778 F.2d 878, 882 (D.C. Cir. 1985). We noted that the appropriate remedy should include, at a minimum, the promotion of King, an award of back pay, and "a full consideration of any further relief." *Id.* at 882 n.7. We remanded for further consideration King's related claims that she was the victim of a discriminatory work environment and of reprisals for having filed an EEOC complaint. *Id.* at 883. On remand, the district court awarded King a retroactive promotion and back pay, as instructed. The parties settled the claims of the discriminatory work environment and retaliation; the merits of the case are not at issue.

King was represented throughout the proceedings by Robert M. Adler, a sole practitioner, who was assisted on occasion by an associate and a law clerk or paralegal. The fee agreement between Adler and King provided that she would be responsible for billings of up to $5,000, as well as for costs and expenses. The agreement also provided that in the event King were to prevail and recover attorney's fees, she could recover any amounts paid, while Adler would receive whatever additional attorney's fees might be awarded. In effect, then, $5,000 of Adler's total fee was noncontingent.

As a result of this court's decision on the merits, King became entitled to an award of attorney's fees and costs pursuant to the fee-shifting provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d) (1982). Accordingly, in March 1986 Adler submitted an application for an interim award of attorney's fees and costs incurred through February 28, 1986. He requested a "lodestar" fee (the presumptive fee arrived at by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation) of $210,160 (based on his historic billing rates), as well as a contingency fee enhancement of thirty-five percent.

By order dated June 11, 1986, the district court awarded interim lodestar fees of $95,937.76. In October 1986, Adler submitted a supplemental application for lodestar fees incurred from March 1 to October 20, 1986, in the amount of $34,485. In addition, he again requested a risk enhancement of thirty-five percent. By order dated February 27, 1987, the court awarded further interim fees of $7,938.

On June 10, 1987, the district court considered the balance of the fee requests and entered a memorandum and order awarding Adler additional lodestar fees and costs of $137,953.28. *King v. Palmer*, Civ. No. 83-1980, Revised Memorandum (D.D.C. June 10, 1987) ("Mem. Op. I"). The resulting total lodestar for the case to that point was $232,707.62, based on then-current billing rates. These fees represented compensation for *all* phases of the litigation, including time spent in pursuit of attorney's fees and time spent on various other matters following this court's remand, such as the defendants' petition for rehearing. As to the risk enhancement, the court retained jurisdiction of the matter pending the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). Mem. Op. I at 12. The court noted, however, that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." Mem. Op. I at 13. The court rejected Adler's claim for a bonus based on exceptional success, and that decision is not appealed here.

Following the decision in *Delaware Valley*, Adler again applied for a contingency enhancement, this time requesting an augmentation of 100 percent. On September 20, 1988, the district court awarded plaintiff a fifty percent enhancement for the risk of nonpayment, or a total of $113,858.31, based on the entire contingent portion of the previously awarded lodestar fee ($232,707.62 - $5,000 = $227,707.62). *King v. Palmer*, Civ. No. 83-1980, Memorandum at 5 (D.D.C. Sept. 20, 1988) ("Mem. Op. II").

The district court considered the request for risk enhancement under the standards established by Justice O'Connor's tie-breaking concurrence in *Delaware Valley*. The court found that King had offered evidence that "many lawyers in the civil rights employment discrimination market would not accept employment in a case like this on a purely contingency fee basis." Mem. Op. II at 3. The court asserted, however, that because the fee arrangement in the instant case was only partially contingent, it was distinguishable from the case of *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989). Mem. Op. II at 3. Instead, the court relied on *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), which also involved a partially contingent arrangement. Mem. Op. II at 3-4. There, the court had determined that "attorneys in the Washington D.C. community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." Mem. Op. II at 4 (quoting *Palmer*, 679 F. Supp. at 74). Adhering to Justice O'Connor's suggestion, in *Delaware Valley*, that "each court let a determination such as Judge Smith's [in *Palmer*] control future cases such as this one," the court adopted a fifty percent enhancement in the instant case. Mem. Op. II at 4.

Both King and the District appealed the enhancement award.

II. Discussion

The District contends that *no* risk enhancement should have been awarded or, in the alternative, that the level of the enhancement should have been twenty-five percent or less. King maintains that it should have been 100 percent of the amount at risk. The District also challenges certain elements of the risk enhancement award, claiming that it was excessive because it was based, in part, on a lodestar that included fees that were not at risk or for

which an enhancement was unnecessary to attract competent counsel. We address these issues in turn.

A. The Availability and Level of Risk Enhancement

In *McKenzie v. Kennickell*, 875 F.2d 330, 332-33 (D.C. Cir. 1989), we adopted Justice O'Connor's concurring opinion in *Delaware Valley*, 483 U.S. at 731-34, as the basis for determining the availability and level of contingency fee enhancements in this circuit. *See also Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988). We followed the two-part test suggested by Justice O'Connor: first, whether the relevant legal market adds a premium for contingency, and second, whether in the absence of an enhancement for risk the plaintiff would have faced substantial difficulty in finding counsel. *McKenzie*, 875 F.2d at 332.

1. *The Relevant Market Test*

To secure a contingency enhancement, a fee applicant must first show the degree to which the relevant legal market compensates for contingency. *Delaware Valley*, 483 U.S. at 733. The "relevant market," for purposes of this analysis, is composed of all contingency claims in the District of Columbia, with special reference to those involving complex federal litigation such as (but not limited to) Title VII cases. *McKenzie*, 875 F.2d at 334-35. In addition, the relevant market is to be determined as of the time the case was undertaken by counsel, rather than at the time fees were awarded. *Id.* In making such an assessment, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market" in order to avoid "[h]aphazard and widely divergent compensation." *Delaware Valley*, 483 U.S. at 733. We thus rejected an individualized approach to fee awards. *McKenzie*, 875 F.2d at 332, 336, 338.

In awarding a fifty percent enhancement in this case, the district court correctly followed the principle of consistency in fee determinations discussed above, as it adhered to the previous contingency enhancement findings of *Palmer v. Schultz*, 679 F. Supp. at 74. Its error, however, was in applying different levels of enhancement to fully and partially contingent cases. The court asserted, without explanation, that there was a "crucial distinction" between such cases and thereby relied on the finding in *Palmer* that "plaintiffs 'have shown that attorneys in the Washington D.C. community will only accept a . . . partially contingent case if their recovery is enhanced by at least 50 percent.' " Mem. Op. II at 4 (quoting *Palmer*, 679 F. Supp. at 74).

Although the *Palmer* court's calculations of attorneys' fees are difficult to discern, it appears to us that it actually awarded an enhancement of 100 percent of the *contingent portion* of the fees—precisely the enhancement urged by King—even though the court referred to a fifty percent enhancement for partially contingent cases. Palmer was obligated to pay her counsel approximately fifty-three percent of their fees; thus, the case was about forty-seven percent contingent. *See* 679 F. Supp. at 73. Counsel charged plaintiff rates that were considerably below market. *Id.* at 71-72. The total lodestar award was $291,160.43, which was based on historic *market* rates. *Id.* at 76. For purposes of the enhancement, however, the court used a lodestar figure of $143,612.34, which was based on the historical rates actually charged by counsel. *See id.* at 73-76; Affidavit of Ellen Kabcenell Wayne, at 4 (counsel in *Palmer* describing calculation of fee enhancement). The enhancement award of $71,806.17, therefore, was exactly fifty percent of the lesser amount, and slightly over 100 percent of the contingent portion (forty-seven percent). *See Palmer*, 679 F. Supp. at 76.

Be that as it may, we conclude that the same percentage enhancement should be applied to the contingent portion of a fee regardless of whether the case is fully or partially contingent. None of the affidavits in the record reveals a practice of charging a lower percentage enhancement of the amount at risk in partially contingent

arrangements, nor do previous decisions in our circuit reflect such a practice. As an economic matter, such an approach makes little sense: we see no reason why Adler, whose fee was ninety-eight percent contingent, should not receive the same rate of enhancement as an attorney who accepted the case on a 100 percent contingent basis. In either case, the attorney would face the same risk of nonpayment for services rendered on a contingent basis, and should therefore be entitled to receive the same percentage enhancement on whatever portion of the lodestar that is at risk.

The question to be determined, then, is the level of enhancement prevailing in the relevant Washington market in 1983. King submitted declarations of over seventy practitioners in support of her contention that a 100 percent risk enhancement was required to ensure contingency representation in the Washington market. Although the District correctly observes that many of these affidavits refer only to a "reasonable" enhancement while others range from significantly below to significantly above 100 percent, we find that the bulk of the evidence supports a 100 percent enhancement as to both the current and the 1983 markets. *See, e.g.*, Declaration and Supp. Declaration of John R. Erickson; Declaration and Supp. Declaration of Joel P. Bennett.

The District nevertheless argues that as Adler himself initially requested only a thirty-five percent enhancement in this case and as he had been awarded only a ten percent enhancement in an earlier Title VII case, *see Bundy v. Jackson*, Civ. No. 77-1359 (D.D.C. Sept. 14, 1982), Adler could not reasonably have expected an enhancement of fifty percent, much less 100 percent, when he agreed to represent King. However true that may be, the District's approach would "contravene the settled doctrine . . . that fees must be awarded regardless of the identity of the fee petitioner." *McKenzie*, 875 F.2d at 338. In *McKenzie* we "reject[ed] the notion that applicants must demonstrate that they . . . were specifically attracted by the possibility of a contingency enhancement." *Id.* Rather, as Justice

O'Connor counseled in *Delaware Valley*, we treat contingency cases as a class, based on the prevailing practices within the relevant legal market.

That practice has now been defined, in a number of recent decisions within this circuit, as requiring a contingency enhancement of 100 percent for the class of cases relevant here. *See, e.g., Thompson v. Kennickell*, 710 F. Supp. 1, 6, 9 (D.D.C. 1989) (awarding enhancement of 100 percent and finding "that the attorney market in the District of Columbia requires contingency enhancements of 100% to 200%"); *Palmer v. Schultz*, 679 F. Supp. at 74 ("at least 100 percent" for fully contingent cases); *Broderick v. Ruder*, Civ. No. 86-1834, Mem. Op. at 4 (D.D.C. Sept. 13, 1989) (awarding 100 percent enhancement); *see also McKenzie*, 875 F.2d at 336 (upholding a 50 percent enhancement, which plaintiff had not appealed, as permissible but describing it as "below the Title VII contingency enhancements typically awarded in this circuit").

We note that although the 100 percent enhancement established by the Washington legal market is substantially higher than the upper limit of one-third urged by Justice White in his plurality opinion in *Delaware Valley*, 483 U.S. at 730, it does not provide attorneys with the incentive to take on cases "in which [they] believe[ ] there is less than a 50-50 chance of prevailing," which the plurality would discourage. *Id.* This is so because with a 100 percent enhancement, attorneys who calculate the risks of the cases they agree to litigate will only realize their non-contingent rates of compensation if they succeed in at least fifty percent of those taken on a contingency basis. Of course, some attorneys will undoubtedly choose to accept higher risk cases because of their personal belief in the cause, the novelty of the issue, or the potential importance of the case. Under our ruling, however, attorneys who accept such cases must bear the cost of the added risk.

To recapitulate, we hold that the district court erred as a matter of law in setting the enhancement at fifty per-

cent. Based on the standards of *McKenzie*, the record before us, and prior decisions within this circuit, we find that the appropriate enhancement to be awarded Adler for his risk of nonpayment is 100 percent of the amount of lodestar fees at risk. Moreover, in conformity with the goal urged by Justice O'Connor, and adopted by this court, that contingency cases within a given market be treated consistently, *see Delaware Valley*, 483 U.S. at 733; *McKenzie*, 875 F.2d at 332, we hold 100 percent to be the appropriate contingency enhancement to be awarded in the District of Columbia until new evidence indicates a significant change in the legal market—or until we receive new guidance for the award of contingency fees from either Congress or the Supreme Court.

2. *The Substantial Difficulty Test*

To prevail on her claim for fee enhancement, King must also establish, pursuant to the second prong of the *McKenzie* test, that in the absence of a risk enhancement, she would have faced substantial difficulty in securing the services of a competent lawyer at the time she sought one. *McKenzie*, 875 F.2d at 332, 336-38. This inquiry, we explained, is "necessarily a counterfactual [one]; [attorneys seeking enhancements] are not required to show that plaintiffs actually did face difficulty." *Id.* at 337. Nor is it necessary for them to demonstrate that they were "specifically attracted by the possibility of a contingency enhancement." *Id.* at 338.

The District contends that the award should be reversed because the district court made no finding that King would have faced substantial difficulties in securing counsel in the absence of risk enhancement. In addition, the District attacks the sufficiency of the evidence proffered by King, arguing that the affidavits submitted are not conclusive proof that there were no lawyers who would have taken King's case on a contingent basis without the possibility of enhancement. The District speculates, for instance, that a public interest group or possibly one of several private attorneys *might* have agreed to represent her, although its argument rests not on any affirmative evidence but merely on supposed ambiguities in certain of the affidavits submitted by King.

It is true that the district court did not explicitly find that King would have faced substantial difficulty in obtaining counsel in the absence of risk enhancement. That finding, however, was implicit in the court's citation to the *Palmer* court's findings that attorneys in the District would not accept contingent cases without some risk enhancement. Mem. Op. II at 2, 4. Moreover, the affidavits filed with the court make it abundantly clear that without this inducement, King would have faced substantial difficulty retaining counsel. *See, e.g.*, Supp. Declaration of George M. Chuzi ("During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis [without some risk enhancement].").

The District's attacks on the sufficiency of King's evidence are unavailing. The test adopted by this court does not require a showing that it would have been impossible to secure counsel on other than an enhanced contingency fee basis, as the District's arguments seem to assume; it requires only a showing of "substantial difficulty." Moreover, the evidence submitted need not be scientifically or statistically unassailable; "[e]vidence in the form of affidavits from practitioners is acceptable." *McKenzie*, 875 F.2d at 337-38. Here, King has met her burden.

Finally, we are unimpressed by the District's argument that Adler's willing representation is relevant evidence that King has failed to satisfy the "substantial difficulty" test. Adler himself declared in an affidavit that he would not have accepted the case without the possibility of risk enhancement. For its part, the District offered no evidence that Adler would have taken the case without risk

enhancement; it merely points to the fee agreement with King, in which Adler states the obvious fact that "there is no assurance" as to the amount of an attorney's fee recovery, if any. More fundamentally, however, it is irrelevant that Adler might have accepted King's case without an enhancement, *so long as* she was able to demonstrate (as she has) that hers is in a class of cases in which "plaintiffs *would have* faced 'substantial difficulties' [in securing counsel] in the absence of contingency enhancements." *McKenzie*, 875 F.2d at 337 (emphasis in original).

B. Challenged Elements of the Risk Enhancement Award

The District argues that even if some enhancement is appropriate, certain portions of the district court's risk enhancement award should be set aside. The District asserts, first, that the lodestar on which the enhancement was calculated should not have included fees for any time spent after December 13, 1985, when this court issued its decision on the merits, because such fees were no longer truly at risk.

We agree with the District that compensation for time devoted to securing an award of attorney's fees may not be enhanced. It is not disputed that the time spent litigating a fee award is itself compensable. *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc). Thus such compensation is not subject to a genuine risk of loss. Furthermore, as Adler himself admitted at oral argument, we doubt that lawyers require special incentives to pursue their own compensation. We therefore hold that contingency enhancements may not be applied to fees accrued in petitioning for, or litigating, fee awards. *See Baughman v. Wil[illegible]on Freight Forwarding Co.*, 583 F.2d 1208, 1219 (3d Cir. 1978) ("[H]ours devoted to the fee petition should not be augmented . . . because of the contingent nature of the case . . . .").

We affirm the district court, however, as to all the remaining elements of the lodestar. In originally calculating the lodestar, the district court fully addressed and discussed the compensability of Adler's time following this court's remand. *See* Mem. Op. I at 8-9, 15-18. From the district court's opinion, it is clear that King was not assured of victory on the merits at the time she incurred the post-remand fees. Rather, these fees related to the defendants' petition for rehearing, the United States' motion to file an *amicus* brief, and the retaliation and hostile work environment claims remanded by this court. Accordingly, "in view of the district court's superior understanding of the litigation," we conclude that the court properly based enhancement on all the contingent elements of the lodestar fee except that attributable to time spent in pursuit of attorney's fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Lastly, the District argues that the risk enhancement award was erroneously calculated on a lodestar that was computed using Adler's then-current, as opposed to historic, billing rates. The result, claims the District, was to magnify the amount appropriate to compensate for risk of loss by adding to the contingency enhancement an "interest" factor designed to compensate for delay in payment. Both parties concede that the use of then-current rates in calculating the lodestar was appropriate as compensation for delay in receiving fees—in other words, as the equivalent of interest. As the economic cost of the risk of nonpayment for which he is to be compensated began at the commencement of representation, we see no reason why counsel should not be compensated for the delay in receiving the enhancement award as well.

III. Conclusion

We hold that King is entitled to a risk enhancement of 100 percent of the amount of fees at risk. We also hold that the enhancement may not be applied to fees awarded for time spent on attorney's fees matters. We therefore reverse the order of the district court and remand for a

calculation of fee enhancement and entry of judgment in accordance with this opinion.

Reversed and Remanded.

WILLIAMS, *Circuit Judge*, concurring: I concur in the opinion of the court except for the passage at 8 that rests approval of the 100% enhancement on affidavits as to market conditions. I write separately to explain why I regard the selection of a risk enhancement figure as in reality a policy choice, one which we as courts are not qualified to make but are required to by controlling precedent. I conclude with a few thoughts on the implications of contingency enhancements with one-way fee-shifting.

I

The opinion's sifting of evidence as to the local market for work on a contingent fee in my view veils a policy judgment: a decision on what the minimum chances of victory must be for a case to be financed by the combination of fee-shifting with contingency enhancements. The answer is, in effect, to allow such financing for any case where the plaintiff's prospects of success are 50% or better.

Unless we impute irrationality to lawyers as a class, we must assume that they are ready to work on contingency at a whole range of premium levels that will, adjusting for the riskiness of the case and for their own risk aversion, make the contingent work the equivalent of noncontingent. Thus, momentarily putting aside risk aversion, if they can get double the basic fee, they will be ready to handle cases with a 50-50 chance of victory or better (the fee in half the cases, doubled, equals noncontingent reimbursement in 100% of cases); if they can recover triple the basic fee, they will be ready to take cases with a 33% chance of victory or better (the fee in one third of the cases, tripled, equals noncontingent reimbursement in all); and so on.

Risk aversion — the conventional preference for an assured $1000 over a 50-50 chance of $2000, or for a bird in the hand over two in the bush — may change the numbers slightly, but probably not a great deal; a large law office, at least, can diversify the risks over a large range

of cases. Of course to keep the risks satisfactory, lawyers must make sure to take pools of somewhat homogeneous cases; winning three $1000 cases will not balance losing three $100,000 ones.

We have here a slew of affidavits from local lawyers, many asserting an unwillingness to take contingent work on a basis of less than 100% enhancement, others a vaguer insistence on "reasonable" enhancement. I have some skepticism about the alleged insistence on 100% enhancement; if a lawyer can identify a class of cases with a two-out-of-three chance of success, he will need only a 50% enhancement to attain the equivalent of noncontingent pay. Justice White plainly recognized the point in his opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), when he suggested a percentage limit to deter lawyers from bringing suits "in which the attorney believes there is less than a 50-50 chance of prevailing." *Id.* at 730. (Justice White set that percentage at 33 1/3%. In fact, this would require lawyers to insist on cases with a three-out-of-four prospect of success.)

If I am right as to the relation between riskiness and premium, the assertion of many lawyers that they will take a contingent fee case only at a 100% enhancement or better is puzzling. One possibility is simply that plaintiff has been much more assiduous than defendant at ferreting out supporting statements. Another is that fine-tuning the risk level in terms of a line between 50-50 and two-out-of-three is very difficult — clients do not tell the whole story, juries are a bit of a gamble, judges perhaps no better. Nonetheless, lawyers and clients do make judgments of this sort when they evaluate settlement proposals, so I suspect that if Congress set 50% as the maximum enhancement for a shifted contingent fee, a very considerable bar would develop to handle such business. In sum, I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa.

Thus the decision seems to me properly Congress's. For when we look beneath the veneer of market analysis, the allowance of a 100% enhancement is clearly legislative — making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better. I know of no basis on which a court would be competent to select that level — or any other. But given the various precedents aptly summarized in Judge Buckley's opinion, I believe we have no choice but to make the judgment. The only guidance that we have on the subject is section V of Justice White's opinion in *Delaware Valley*, a section joined by three other Justices. As I've already noted, that discussion points in two directions: the proposed 33 1/3% enhancement implies a minimum-prospect case with a .75 chance of success, but the proposed 50-50 minimum-prospect case implies a 100% enhancement. As my colleagues have chosen the 100% (and thus 50-50), and the entire legislative judgment is one on which I have no claim to authority at all, I certainly have no basis for dissent.

II

The implications of contingency enhancements with one-way fee-shifting are curious. In the normal contingency fee arrangement (i.e., without fee-shifting), the plaintiff's possible gain sets a limit on the investment of legal effort; it usually represents the sole source of any return on that investment. There will of course be cases of principle, but they will not feed or clothe much of the bar much of the time. To introduce one-way fee-shifting, as Congress has for Title VII of the 1964 Civil Rights Act; see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (construing fee-shifting section, which allows fees for the "prevailing party," as allowing awards to prevailing defendants only when plaintiff's claim was "frivolous, unreasonable, or groundless"), weakens but does not eliminate that barrier. It survives to a degree, because without enhancements for contingency, counsel must contract for enough of plaintiffs' possible recoveries

to compensate themselves for the time spent on unsuccessful suits. The enhancement for contingency lowers the barrier still further; where it is set at 100%, as here, all cases with a 50-50 chance or better become promising spots for investment of legal effort. (Plaintiff's potential recovery has a residual relevance even here, as agreements entitling the lawyer to part of the recovery provide an additional source of compensation for time spent on losers.)

But this does not mean that all 50-50 cases will be litigated to the hilt; a defendant can just give up. If one assumed that the stakes were symmetrical (a dollar gain for plaintiff being matched by a dollar's loss for defendant), the same forces that in conventional contingent-fee litigation limit the plaintiff's lawyer's investment would operate indirectly, through the defendant (though with the terms of the likely settlement affected by the one-way characteristic of the fee-shifting, a matter addressed below). Often, however, they will not be. For example, in a case by an employee claiming wrongful dismissal, there may be only a modest gain to the plaintiff from securing reinstatement; the next-best employment opportunity may be quite similar. But the employer may have come to the view that plaintiff's presence imposes substantial costs — salary (less the employee's positive contribution), plus negative effects on output. The present discounted value of these costs will represent a potential downside risk of the litigation for defendant.

In considering settlement, defendant will look at the following (at least) as the costs of persisting: (1) his additional legal fees; and (2) the costs of losing, including (a) monetary judgments, (b) the sort of costs suggested in the paragraph above, and (c) the costs of plaintiff's fee (adjusted for the risk enhancement), all adjusted for the likelihood of losing. Cf. George L. Priest, *Selective Characteristics of Litigation*, 9 J. of Leg. Stud. 399, 401 (1980). The rule we here adopt makes 2(c) a hefty item.

Two consequences emerge, then: First, adding contingent-fee enhancement to one-way fee-shifting

enlarges the class of cases that will be brought free of a conventional limit on the investment of legal resources in litigation, namely, the value of the litigation to the plaintiff. It thus implies an increase in the portion of the country's wealth to be devoted to litigation (mainly to lawyers). Second, adding enhancement for contingency greatly improves the plaintiff's bargaining power in settlement negotiations. As several opinions in *Delaware Valley* observed, enhancement of a shifted fee has the effect of making losing defendants pay not only their own litigation costs, and those of the plaintiffs to whom they lose, but also, indirectly, the fees of losing plaintiffs. See 483 U.S. at 719-20, 722 (section III-A of Justice White's opinion and thus the opinion of the Court); see also *id.* at 732 (O'Connor, J., concurring in part, and concurring in the judgment). But cf. *id.* at 752-53 (Blackmun, J., dissenting). As the fee-shifting is one-way only, this is not offset by any possibility of defendants' recovering their own legal expenses in the event of victory. The resulting enfeeblement of defendants' bargaining position alters the character of the settlements that will emerge, shifting the real-world impact of the substantive law toward plaintiffs. While one might argue that this shift merely counterbalances factors artificially impeding plaintiff recoveries and thus makes the net impact of the statute correspond to its language, it may in fact carry the balance far beyond that point.

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No. 91-810

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR.; ERNEST DAGUE, JR.; BETTY DAGUE; and ROSE A. BESSETTE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Date: March 12, 1992

TABLE OF CONTENTS

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. *DELAWARE VALLEY II* ESTABLISHED THAT REGARDLESS WHETHER CONTINGENCY ENHANCEMENTS UNDER FEDERAL FEE-SHIFTING STATUTES ARE EVER APPROPRIATE, THEY SHOULD NEVER BE BASED ON THE PLAINTIFF'S LIKELIHOOD OF SUCCESS 7

II. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THIS IS ONE OF THOSE RARE CASES IN WHICH CONTINGENCY ENHANCEMENT IS APPROPRIATE 11

III. CONTINGENCY ENHANCEMENTS ARE NEVER APPROPRIATE UNDER FEDERAL FEE-SHIFTING STATUTES 15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:
Bernardi v. Yeutter, 942 F.2d 562 (9th Cir. 1991) . . 16
Blanchard v. Bergeron, 109 S. Ct. 939 (1989) . 11, 12
Blum v. Stenson, 465 U.S. 886 (1984) 11
Craig v. Secretary, Dep't of Health and Human Servs., 864 F.2d 324 (4th Cir. 1989) 16
Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295 (2d Cir. 1987) 4
Hensley v. Eckerhart, 461 U.S. 424 (1983) 7, 10
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*) 2, 6, 13, 14, 16
Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988) 16
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air [*Delaware Valley I*], 478 U.S. 546 (1986) 11, 12
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air [*Delaware Valley II*], 483 U.S. 711 (1987) . . . . . *passim*
Smith v. Freeman, 921 F.2d 1120 (10th Cir. 1990) . 16
Sullivan v. Crown Paper Board Co., 719 F.2d 667 (3d Cir. 1983) 15
United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) 13
Venegas v. Mitchell, 110 S. Ct. 1679 (1990) . . 14, 15
Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989), *aff'd sub nom. Venegas v. Mitchell*, 100 S. Ct. 1679 (1990) 15
Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986) 15

Statutes:
Civil Rights Act of 1964, Title VII 18
Clean Air Act
§ 304(d), 42 U.S.C. § 7604(d) 7
Clean Water Act 3
33 U.S.C. § 1365(d) 3
Conservation and Recovery Act 3
42 U.S.C. § 6972(e) 3

42 U.S.C. § 1988 . . . . . 14, 15

Miscellaneous:
Office of Program Operations, EEOC, ANN. REP. (1989) 18

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts. While WLF fully supports enforcement of our nation's environmental and civil rights laws, WLF believes that the chief result of providing contingency enhancements to the attorney fees awarded to prevailing plaintiffs in environmental and civil rights cases will be to line the pockets of the nation's lawyers at the expense of taxpayers and to increase the quantity of unmeritorious lawsuits clogging our courts.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* in the federal courts on a number of occasions. AEF believes that the public interest is best served by a legal system that does not overcompensate lawyers and does not provide too many incentives for the filing of lawsuits.

Amici are particularly eager to file their brief in order to dispel any notion -- that might arise due to the anticipated filing of several *amicus* briefs by attorney groups on behalf of Respondents -- that lawyers as a group support the award of contingency enhancements as a part of attorney fees awarded under federal fee-shifting statutes. Many lawyers, including those at WLF, share the public's distaste for the large attorney fees often awarded under those statutes. Indeed, WLF has had a policy of never seeking an award of attorney fees as the prevailing party in litigation.

Both WLF and AEF appeared as *amici* in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), arguing that lodestar fees awarded under federal fee-shifting statutes should not be enhanced to compensate the plaintiff's attorney for assuming the risk of nonrecovery. Neither WLF nor AEF has any financial interest in the outcome of this case and thus can assist the Court by providing a perspective that is distinct from that of either party.

Amici submit this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioner's brief.

In brief, Respondents (owners of land adjacent to a landfill operated by Petitioner City of Burlington, Vermont) brought suit in federal district court against Burlington, alleging that the city was operating the landfill in violation of a variety of federal and state laws. Respondents retained William W. Pearson to represent them in the lawsuit, under an arrangement that called for the payment of no attorney fees unless Respondents prevailed.

Following a bench trial, the district court entered judgment for Respondents on some, but not all, of their claims. Pet. App. 59-115. The district court subsequently awarded attorney fees to Respondents pursuant to 42 U.S.C. § 6972(e) and 33 U.S.C. § 1365(d) -- the fee-shifting provisions of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act, respectively. Pet. App. 130-134.[1] The court awarded Respondents their "lodestar" fee ($198,027.50)[2] and then added a 25% contingency enhancement ($49,506.87) that was in-

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[1] The two provisions are identically worded; they provide for an award of "reasonable attorney and expert witness fees" to any party, whenever appropriate.

[2] The computation of Respondents' "lodestar" fee (the reasonable number of hours worked by Respondents' attorneys multiplied by a reasonable hourly fee) was not disputed.

tended to compensate Respondents' attorney for having assumed the risk that he would receive nothing had Respondents not prevailed. The district court explained its decision to award a contingency enhancement by stating that Respondents' "risk of not prevailing was substantial under the facts here" (Pet. App. 132) and that "absent an opportunity for enhancement, [Respondents] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." Pet. App. 133.

Burlington appealed the entire judgment, including the award of attorney fees, to the United States Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit affirmed the decision of the district court in all respects. Pet. App. 1-37. With respect to the contingency enhancement issue, the Second Circuit held that the "critical inquiry" was "'whether without the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" Pet. App. 37 (quoting *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987)). Applying that standard, the appeals court upheld the district court's decision to award a contingency enhancement. *Id.*

Respondent subsequently filed motions seeking additional attorney fees for work performed in the appeals court and for work performed in the trial court for the period following October 1989. Burlington did not respond to either motion.[3] The Second Circuit awarded

[3] Respondents asserted in their opposition to the petition for certiorari that Burlington had in some way waived its objection to all attorney fee awards by failing to respond to the two subsequent fee requests. Resp. Br. at 22. That assertion is without merit. Burlington objected to the district court's initial attorney fee award (including a specific objection to the contingency enhancement) at all appropriate opportunities before the Second Circuit and this Court, including in its petition for certiorari. *See* Pet. at 25-27. Regardless whether (continued...)

appellate fees but declined Respondents' request for a contingency enhancement above the lodestar amount, stating, "The 'risk' involved in defending an appeal is not significant and in the circumstances of this case, calls for no enhancement of the 'lodestar' amount." Pet. App. 38-39. The district court's supplemental attorney fee award covering the period October 1989 to October 1991 included a 25% contingency enhancement (amounting to $6,028.00) based on the court's "previous findings" regarding the need for enhancement. Pet. App. 137-138.

On November 18, 1991 Burlington filed its petition for a writ of certiorari, seeking review of all aspects of the Second Circuit's June 12, 1991 decision. The Court granted the petition, limited to the question whether the district court had acted properly in awarding a contingency enhancement in excess of the lodestar amount.

SUMMARY OF ARGUMENT

The district court based its award of a contingency enhancement to a significant degree on its finding that Respondents, at the time they filed suit, faced a substantial risk of not prevailing. While this Court has been divided on the issue of whether contingency enhancements should ever be awarded, it has been unified in holding that the plaintiff's likelihood of success at the time suit is filed is irrelevant in determining whether a contingency enhancement is justified. Accordingly, regardless how the Court ultimately rules regarding the availability of contingency enhancements, the 25% enhancement awarded in this case should be overturned because it was based in part on the Court's evaluation of Respondent's likelihood of success.

[3] (...continued)
Burlington has preserved its rights to appeal from subsequent fee awards, there is no basis for asserting that failure to preserve such rights constitutes a waiver of the rights that clearly were preserved.

Moreover, even assuming that the Court rules that contingency enhancements are appropriate in some exceptional circumstances, this case is not one of those circumstances. Respondents have not even alleged that their attorney would not have taken the case but for the prospect of a contingency enhancement; in the absence of such an allegation, enhancement is never appropriate, because the sole justification for awarding contingency enhancements is to ensure that plaintiffs with meritorious claims are not left without representation. Also, the fact that Respondents were suing for money damages makes their case that much more attractive to potential lawyers and, therefore, that much less likely a candidate for contingency enhancement.

Finally, although the Court need not reach this issue in order to rule for Burlington, *amici* submit that contingency enhancements are never appropriate in suits brought under federal fee-shifting statutes. The lodestar amount awarded in such cases should adequately compensate the plaintiff. *Amici* submit that the plurality opinion in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air* [*Delaware Valley II*], 483 U.S. 711 (1987), and of the D.C. Circuit in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), are persuasive in demonstrating that contingency enhancements are inappropriate. It may be that some lawyers will suffer hardship in the absence of contingency enhancements, but the purpose of the federal fee-shifting statutes is to ensure the vindication of the federal-law rights of individuals, not to provide full employment for lawyers.

ARGUMENT

I. *DELAWARE VALLEY II* ESTABLISHED THAT REGARDLESS WHETHER CONTINGENCY ENHANCEMENTS UNDER FEDERAL FEE-SHIFTING STATUTES ARE EVER APPROPRIATE, THEY SHOULD NEVER BE BASED ON THE PLAINTIFF'S LIKELIHOOD OF SUCCESS

Any discussion of the award of contingency enhancements to prevailing plaintiffs in cases brought pursuant to statutes containing fee-shifting provisions must begin with the Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley II*], 483 U.S. 711 (1987), the only prior occasion on which the Court has dealt directly with the contingency enhancement issue.[4] Unfortunately, guidance available from that decision is extremely limited due to the absence of any opinion that commanded the support of a majority of the members of the Court. But the Second Circuit was not justified in concluding that the splintered nature of *Delaware Valley II* gave it license to ignore the decision altogether; in doing so, the Second Circuit ended up applying a standard for the award of contingency enhancements that no member of the *Delaware Valley II* court would have been willing to accept.

The justices split into three groups in the *Delaware Valley II* decision. Five justices (Chief Justice Rehnquist and Justices O'Connor, Powell, Scalia, and White) held that the prevailing plaintiffs had failed to establish an entitlement to attorney fees in excess of the lodestar fee as compensation for the risk that they would have been awarded no fees if they had not prevailed (referred to

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[4] While *Delaware Valley II* involved a federal fee shifting statute not at issue here (§ 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d)), the Court has said that its standards for determining "reasonable" fees apply to all federal statutes awarding "reasonable" attorney fees to a "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

herein as a "contingency enhancement"). Four of those five justices held (in a plurality opinion written by Justice White) that contingency enhancements are *never* warranted under federal fee-shifting statutes because those statutes provide only for payment of a "reasonable" fee, and the lodestar fee is a presumptively reasonable fee. *Id.* at 727-28.[5] The fifth justice (Justice O'Connor) stated that while in some cases contingency enhancements may be appropriate, the plaintiffs in *Delaware Valley II* were ineligible for such enhancements because they failed to show: (1) that contingency enhancements "were necessary to attract competent counsel in the relevant community"; and (2) that in the absence of the prospect of a contingency enhancement, the applicant would have faced "substantial difficulties" in obtaining counsel. *Id.* at 733-34 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor made clear her belief that contingency enhancements are not to be the norm by concurring in the judgment of the Court that the plaintiffs were not even entitled to a remand for purposes of establishing their entitlement to a contingency enhancement under the standards enunciated in *Delaware Valley II*.

Four dissenters (Justices Blackmun, Brennan, Marshall, and Stevens) stated that contingency enhancements should be available under some circumstances. The dissenters would have remanded the case for a redetermination of any contingency enhancements, to be based primarily on a determination of the extent to which the relevant legal market compensated for contingency. *Id.* at 754 (Blackmun, J., dissenting).

All nine justices appear to have been in substantial agreement on that last point -- that any contingency enhancement should focus primarily on market-wide condi-

[5] Justice White's plurality opinion went on to state that even if contingency enhancements were ever appropriate, in no event should they be awarded except in "exceptional cases" where without contingency enhancement the plaintiff "would have faced substantial difficulties in finding counsel." *Id.* at 728, 731.

tions rather than on an individual plaintiff's circumstances. *See id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment)("I also agree [with the dissent] that compensation for contingency must be based on the difference in market treatment of contingency fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case"); *id.* at 731 (pluralty opinion)(focus of risk enhancement determination should be difficulty faced by "poor clients with good claims" in finding counsel within the local legal market, not "the risk of winning or losing in a specific case").

The Second Circuit, in choosing to ignore *Delaware Valley II*, has adopted a standard that cannot be squared with any of the three opinions in that case. The Second Circuit endorsed the district court's conclusion that a contingency enhancement was appropriate in this case in part because "the risk of not prevailing was substantial." Pet. App. 37. The district court's reliance on a factor considered irrelevant by all nine *Delaware Valley II* justices requires reversal. Even if the Court ultimately decides that contingency enhancement is appropriate in certain situations, the Court at least should remand the case with directions that the contingency enhancement issue be considered anew -- this time without reference to Respondents' likelihood of success at the start of the litigation.

The reasons why a particular plaintiff's likelihood of success should play no role in the contingency enhancement decision are readily apparent. Perhaps most importantly, permitting consideration of likelihood of success would have the perverse effect of giving the strongest incentives for litigation to those with the weakest claims, since those with the weakest claims would be able to command the highest contingency enhancements if they ultimately prevailed. The only justification for such a rule would be a determination that all those contemplating suit under a statute with a fee-shifting provision (regardless whether their claim is strong is weak) should have an equal opportunity to retain lawyers to press their claims.

There is no indication that Congress ever made such a determination. To the contrary, Congress adopted fee-shifting statutes to permit the vindication of statutory rights, not to promote speculation in litigation. Society is best served by a legal system that facilitates the filing of highly meritorious claims but that does nothing to encourage highly doubtful claims. If clients and their lawyers wish to bring highly doubtful claims, they ought to be willing to assume for themselves the risk that they will not prevail.

Moreover, the issue of whether a contingency enhancement should be awarded will only arise after a plaintiff has prevailed. Once counsel and the trial judge know the outcome of the case, it is highly unlikely that they can objectively evaluate the plaintiff's chances of success from the perspective of an attorney first considering whether to take on the case. *See Delaware Valley II*, 483 U.S. at 722 (plurality opinion).

Finally, this Court has long recognized that fee award disputes should not be permitted to turn into lengthy satellite litigation. *See, e.g., Hensley*, 461 U.S. at 437. To permit parties disputing fee awards to litigate the strength of the plaintiff's case as of the start of the litigation (a dispute in which, ironically, the roles would be reversed, each party stressing the weaknesses in his own case) would be an open invitation to such satellite litigation.

In sum, the Second Circuit erred in upholding a contingency enhancement that was based in substantial part on the district court's determination that, at the start of the litigation, the plaintiff's risk of not prevailing was substantial. That error requires reversal; at the very least, Burlington is entitled to a remand for a redetermination of the contingency enhancement issue undertaken without regard to Respondent's likelihood of success at the start of the litigation.

II. RESPONDENTS HAVE FAILED TO ESTABLISH THAT THIS IS ONE OF THOSE RARE CASES IN WHICH CONTINGENCY ENHANCEMENT IS APPROPRIATE

Although *Delaware Valley II* indicates that the justices have been closely divided on the question of whether contingency enhancements are ever permissible, a solid majority of the Court has held that any enhancement of attorney fees above the lodestar amount is to be the exception rather than the rule. Thus, in *Blum v. Stenson*, 465 U.S. 886 (1984), the Court stated that the reasonable number of hours worked times a reasonable hourly rate (the lodestar amount) "is presumed to be the reasonable fee contemplated" by a federal fee-shifting provision and that only in a "rare case" will an upward adjustment to that "presumptively reasonable fee" be appropriate. *Blum*, 465 U.S. at 897, 901 n.18. Similarly, in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* [*Delaware Valley I*], 478 U.S. 546 (1986), the Court cited the language from *Blum* quoted above, stated that there is a "strong presumption" that the lodestar figure is the statutorily prescribed "reasonable" fee, and concluded, "Although upward adjustments of the lodestar figure are still permissible, . . . such modifications are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower court." *Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-901). The Court has made clear that the fee applicant "bears the burden of entitlement to an award." *Hensley*, 461 U.S. at 437.

Supreme Court decisions issued since *Delaware Valley II* employ equally strong language in holding that upward adjustment of the lodestar figure is to be reserved for rare and exceptional cases. For example, in *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989), the Court cited *Delaware Valley I* for the proposition that there exists a "strong presumption" that the lodestar figure is the fee to be awarded under a fee-shifting provision. Nothing in

Blanchard suggests that the Court believed that *Delaware Valley II* had affected that presumption in any way.

While the aforementioned case law does not absolutely rule out the award of a contingency enhancement in this case, it does make clear that Respondents face a monumental task in overcoming the presumption that the lodestar figure is the fee to be awarded in this case and in convincing the Court that this is one of those "rare" and "exceptional" cases in which an upward adjustment of the lodestar figure is warranted.

The record in this case indicates that the upward adjustment of Respondents' fee award was unwarranted. *Delaware Valley I* requires that, at a minimum, any contingency enhancement award be supported by "detailed findings by the lower court." *Delaware Valley I*, 478 U.S. at 565. The district court's conclusion that Respondents would have faced substantial difficulty in obtaining counsel of reasonable skill and competence absent an opportunity for contingency enhancement is not supported by any "detailed findings," but solely by a vague reference to "memoranda and affidavits" on file. Pet. App. 133.

The affidavits submitted by Respondents consisted of statements by Mr. Pearson and other attorneys to the effect that no attorney besides Mr. Pearson would have taken Respondents' case. But the affidavits no where suggest that Respondents would have had any difficulty in obtaining counsel absent the availability of contingency enhancements. For example, Mr. Pearson does not state that he would not have accepted the case but for the opportunity for contingency enhancement.[6] In the absence of such

[6] Mr. Pearson's affidavit is devoted primarily to establishing his special skill in handling complex environmental litigation and that he was one of the few qualified attorneys in Vermont willing to handle such litigation on an other-than-hourly-rate fee basis. Mr. Pearson's skills should be reflected in the district court's lodestar fee (continued...)

evidence, Respondents have not even begun to establish that this is one of those "rare" and "exceptional" cases in which an upward adjestment of the lodestar amount is warranted.

Moreover, even if Mr. Pearson had claimed that he would not have accepted the case but for the opportunity for contingency enhancement, that type of evidence should be viewed with an extremely critical eye. As the D.C. Circuit has explained in declining to accord weight to such attorney affidavits:

> We do not think that we can accept such evidence as meeting the substantial difficulties test [established in *Delaware Valley II*]. Without in any way denigrating the *bona fides* of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative, or even weighty, the substantial difficulties test would be so easily met as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. *See United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990)*(holding such evidence to be "blatently insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted").

King v. Palmer, 950 F.2d at 779.

Also, to permit reliance on such attorney affidavits would be in effect to allow in evidence of the strength or weakness of the fee applicant's claim at the time of filing suit, a factor that all nine justices in *Delaware Valley II*

[6] (...continued)
determination, but they are irrelevant to the contingency enhancement issue.

said should not be considered in contingency enhancement determinations. That is so because "surely the principal reason a lawyer will turn down a case under a fee-shifting statute" is his/her belief that the case is unlikely to prevail -- rather than an aversion to taking any non-fee-paying cases. *Id.* at 780. Thus, courts should not rely on such attorney affidavits in making contingency enhancement determinations, because "[i]f the courts cannot . . . directly [consider the risks undertaken by an individual fee applicant], how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case?" *Id.*

Finally, Respondents' complaint included a claim for money damages. There can be little justification for awarding contingency enhancements in cases, as here, involving significant damage claims (as opposed to cases where the only claims are for injunctive relief). Such cases are particularly attractive to lawyers because any judgment recovered could be earmarked for the payment of attorney fees. Any attorney who did not believe that the prospect of recovering a lodestar fee was sufficient incentive to take Respondents' case could have increased the incentive by entering into a fee agreement with Respondents whereby Respondents would agree to pay as an attorney fee a percentage of whatever recovery they received (in addition to whatever fee might be ordered by the court).

The Supreme Court unanimously held that such contingency agreements are fully enforceable by attorneys, even when the fee award as computed under a contingency agreement far exceeds any award that the attorney could have hoped to receive from the court. *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990).[7] Even before the

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[7] In *Venegas*, the district court awarded fees of $117,000 under 42 U.S.C. § 1988, of which $75,000 was attributable to work done by Mitchell, the plaintiff's first lawyer. Mitchell had entered into a contingency fee agreement with the plaintiff calling for payment of 40% of the gross amount of any recovery. The plaintiff obtained a (continued...)

Supreme Court's decision, the enforceability of such agreements was not open to serious question; most of the courts of appeals that had addressed the issue had ruled that such agreements were fully enforceable. *See Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 923 (8th Cir. 1986); *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 669-70 (3d Cir. 1983). Consequently, an attorney reviewing Respondents' case at the time they were seeking to file suit would have had more than sufficient financial incentive to agree to take the case, even in the absence of the prospect of contingency enhancements.

In sum, regardless whether contingency enhancements are ever properly awardable in cases brought under federal statutes with fee-shifting provisions, this case clearly is not one of those "rare" and "exceptional" cases that are the only conceivable candidates for the award of contingency enhancements. There simply is no evidence[8] that Respondents would not have been able to find competent counsel but for the prospect that a contingency enhancement could be recovered.

III. CONTINGENCY ENHANCEMENTS ARE NEVER APPROPRIATE UNDER FEDERAL FEE-SHIFTING STATUTES

In light of the Court's inability to speak with a clear voice in *Delaware Valley II* regarding the availability of

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[7] (...continued)
judgment in his favor of $2.08 million. The Supreme Court held that Mitchell was entitled to full enforcement of the contingency fee agreement, even though the fee due under that agreement was many times the "reasonable" fee awarded pursuant to 42 U.S.C. § 1988 by the district court to the plaintiff for work performed by Mitchell. *Id.*, 110 S. Ct. at 1682-84.

[8] Other than the evidence that Respondents' risk of not prevailing was substantial at the time suit was filed; as noted above, *Delaware Valley II* makes clear that such evidence may not properly be considered.

contingency enhancements under federal fee-shifting statutes, the courts of appeals have had to fend for themselves in resolving that issue. Not surprisingly, they have reached conflicting results.

A few circuits, such as the Second Circuit in this case, have been relatively liberal in the award of contingency enhancements and by and large have left such decisions to the sound discretion of the district courts. Such circuits have routinely approved contingency enhancements of as much as 100% of the lodestar amount. *See, e.g., Bernardi v. Yeutter*, 942 F.2d 562, 565-66 (9th Cir. 1991). Other circuits have recognized the possibility that contingency enhancements could be awarded under exceptional circumstances but have established sufficiently high barriers to such awards that in practice contingency enhancements are almost never awarded. *See, e.g., Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989); *Leroy v. City of Houston*, 831 F.2d 576, 583 (5th Cir. 1987). The D.C. Circuit has joined the *Delaware Valley II* plurality in finding that contingency enhancements are never available. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*).

Amici submit that the D.C. Circuit decided the issue correctly. *Amici* subscribe fully to that court's well-reasoned decision and thus will not repeat each of the court's arguments here. Nonetheless, WLF wishes to stress several points.

First, as a practical matter there is no middle ground between routinely awarding contingency enhancements or not awarding them at all. Once a court determines that a particular legal market requires contingency enhancements in order for deserving plaintiffs to obtain adequate legal representation, then every attorney in that market will be entitled to upward adjustments from the lodestar amount. Judicial resources are simply too scarce to permit the issue of whether a particular legal market requires contingency enhancements to be relitigated every time a plaintiff

prevails in a suit brought under a fee-shifting statute. Given a choice between always awarding enhancements or never doing so, this Court's prior pronouncements that the lodestar fee is a presumptively reasonable fee and that it should be adjusted upward only in "rare" and "exceptional" cases suggests that the Court opt for never awarding contingency enhancements.

Second, the only type of evidence readily available to attorneys seeking contingency enhancement has been affidavits from other lawyers stating that they do not take cases on a non-fee-paying basis or that they would not have taken the plaintiff's case without any prospect of contingency enhancements. As noted above, the essentially self-serving nature of all such affidavits, plus the fact that they ask attorneys to speculate what they would have done under hypothetical circumstances long since past, deprive such affidavits of virtually all of their evidentiary value. Moreover, such evidence inevitable requires district courts to delve into the strength of the plaintiff's case at the time the complaint was filed, an inquiry that all nine *Delaware Valley II* justices condemned. Accordingly, rather than requiring district courts to continue to undertake these types of factual inquiries, the Court should simply declare that contingency enhancements are never available.

Third, once one accepts the propriety of contingency enhancements, there is no limiting principle that would place a cap on the level of permissible enhancements. It is undoubtedly true that the higher the level of permissible contingency enhancements, the stronger will be the enforcement of the civil rights and environmental laws that contain fee-shifting provisions. If 100% contingency enhancement leads to strong enforcement of the civil rights/environmental laws, then surely 200% contingency enhancement would lead to even stronger enforcement, and 1000% contingency enhancement would result in a plaintiff's civil rights/environmental law attorney opening up shop on every block. *Amici* believe that American society is already suffering from an overabundance of lawyers and litigation. Given the degree to which the business

community is being overburdened by the costs of defending nonmeritorious civil rights and enviromental law complaints,[9] the last thing we need to be doing is thinking up ways to encourage more lawyers to get involved in bringing civil rights/environmental lawsuits, at least in the absence of evidence that significant numbers of plaintiffs with meritorious claims have been unable to retain legal counsel.

Finally, the Court should not lose sight of the fact that the federal fee-shifting statutes are intended to assist private citizens in asserting their rights, not to provide a full-employment scheme for lawyers. Much of the focus of those who support contingency enhancements has been on why it is uneconomical for lawyers to take civil rights and environmental cases on other than an hourly-fee basis. *Amici* respectfully suggest that those who focus on the plight of attorneys trying to make a go of a civil rights or environmental law practice are focusing on the wrong parties. If one focuses instead on those wishing to assert claims, it becomes immediately apparent that there is no shortage of lawyers willing to take their cases on a non-fee-paying basis -- how else can one explain the large number of fee award disputes now flooding the federal courts? Whether lawyers take such cases because they wish to provide a money-losing public service, or because they have not yet figured out what the American Bar Association keeps trying to tell them (that one cannot make a go of a civil rights or environmental law practice in the absence of contingency enhancements), or because (just maybe) they would not have available sufficient fee-paying

[9] For example, one indication that a claim filed under Title VII of the Civil Rights Act of 1964 may have merit is a finding by the Equal Employment Opportunity Commission that there is probable cause to believe that a Title VII violation has occurred. The EEOC makes such a finding in only a small fraction of its investigations. In its fiscal year 1989, the EEOC determined the merits of 66,209 charges that had been filed with it, and found merit in only 11,516 (16.8%) of those charges. Office of Program Operations, EEOC, Annual Report for Fiscal Year 1989, at B2.

business to keep themselves fully occupied if they stopped taking civil rights and environmental law cases, the fact remains that many very competent lawyers regularly take such cases on a non-fee-paying basis.

In sum, the federal fee-shifting statutes provide for the award of "reasonable" attorney fees to prevailing parties, and there is no valid reason for concluding that award of the lodestar amount does not provide a "reasonable" fee, even in cases where the plaintiff's attorney has assumed the risk of non-recovery of fees in the event that his client does not prevail.

CONCLUSION

For all the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse that portion of the decision of the United States Court of Appeals for the Second Circuit that affirmed the award to Respondents of a 25% contingency enhancement to their lodestar fee award.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Counsel for *amici*

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(10)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON,
Petitioner,

v.

DAGUE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ROGER E. WARIN
(Counsel of Record)
JERALD S. HOWE, JR.
D. BENSON TESDAHL
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Amici Curiae Lawyers' Committee and Women's Legal Defense Fund

April 13, 1992

(Additional Attorneys Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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DONNA LENTHOFF
WOMEN'S LEGAL
DEFENSE FUND
2000 P Street, N.W.
Washington, D.C. 20036
(202) 986-2600

HERBERT M. WACHTELL
Co-Chairman
WILLIAM H. BROWN, III
Co-Chairman
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212
Attorneys for Amici Curiae
Lawyers' Committee and
Women's Legal Defense Fund

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a court, in determining a reasonable attorney's fee award under one or more federal fee-shifting statutes, may enhance the fee award above the lodestar amount in order to reflect the fact that the attorney had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all.

LIST OF PARTIES BELOW

CITY OF BURLINGTON, Petitioner

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A BESSETTE, Respondents

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. FEDERAL FEE-SHIFTING STATUTES DO NOT FORECLOSE RISK ENHANCEMENTS IN APPROPRIATE CASES IN WHICH THE PREVAILING PARTY HAS BEEN REPRESENTED BY COUNSEL ON A CONTINGENT FEE BASIS	7
A. The Legislative History Of The Civil Rights Attorney's Fees Award Act Of 1976 Reflects Congressional Endorsement Of Risk Enhancement As An Appropriate Consideration Under That And Similar Fee-Shifting Statutes	8
B. In Complex Litigation Cases Prior To 1976, Federal Courts Frequently Allowed Risk Enhancement, And Such Cases Have Been Referenced With Approval By Congress	9
C. In Cases After 1976, Federal Courts Have Often Continued To Allow Risk Enhancement, And Congress Has Never Attempted To Overrule Such Cases In Any Fee-Shifting Legislation Enacted During This Time Period	11
D. This Court Has Already Recognized That Congress Has Not Foreclosed Contingency Enhancement	12
II. A "REASONABLE ATTORNEY'S FEE" OFTEN REQUIRES A RISK ENHANCEMENT FOR A CASE TAKEN BY A LAWYER ON A CONTINGENT FEE BASIS	15

TABLE OF CONTENTS—Continued

	Page
A. Empirical Evidence Of Markets For Legal Services Demonstrates That The Availability Of Risk Enhancement In Appropriate Cases Is Often One Element Of A "Reasonable Attorney's Fee"	16
B. None Of The Policy Arguments Leveled Against Risk Enhancement Is Of Any Force To Rebut The Congressional Mandate For The Award Of "Reasonable Attorney's Fees"	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
Alberti v. Klevenhagen, 896 F.2d 927, *modified*, 903 F.2d 352 (5th Cir. 1990), *cert. granted in part*, 112 S. Ct. 964 (1992)	14
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)	12
Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959)	9
Arenson v. Board of Trade, 372 F. Supp. 1349 (N.D. Ill. 1974)	9
Blum v. Stenson, 465 U.S. 886 (1984)	21
Bouman v. Block, 940 F.2d 1211 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 640 (1991)	14, 19
Burlington v. Dague, 112 S. Ct. 964 (1992)	5
Cherner v. Transitron Elec. Corp., 221 F. Supp. 55 (D. Mass. 1963), *modified and aff'd sub nom. Green v. Transitron Elec. Corp.*, 326 F.2d 492	
Craig v. Department of Health & Human Servs., (1st Cir. 1964)	15
864 F.2d 324 (4th Cir. 1989)	14
Crumbaker v. Merit Sys. Protection Bd., 827 F.2d 761 (Fed. Cir. 1987)	14
Dague v. Burlington, 935 F.2d 1343 (2d Cir. 1991), *cert. granted in part*, 112 S. Ct. 964 (1992)	14
Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 762 F.2d 272 (3d Cir. 1985), *modified*, 478 U.S. 546 (1986), *rev'd*, 483 U.S. 711 (1987)	8
Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)	9
Fadhl v. City and County of San Francisco, 859 F.2d 649 (9th Cir. 1988)	19
Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295 (2d Cir. 1987)	4
Green v. Transitron Elec. Corp., 326 F.2d 492 (1st Cir. 1964)	9
Hensley v. Eckerhart, 461 U.S. 424 (1983)	21, 22
In re Osofsky, 50 F.2d 925 (S.D.N.Y. 1931)	9
Jacobs v. Mancuso, 825 F.2d 559 (1st Cir. 1987)	14

TABLE OF AUTHORITIES—Continued

	Page
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)	8
Kelly v. Matlack, Inc., 903 F.2d 978 (3d Cir. 1990)	14
King v. Palmer, 906 F.2d 762 (1990), *vacated and reversed en banc*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992)	18
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992)	10, 11, 14
Lattimore v. Oman Constr., 868 F.2d 437 (11th Cir. 1989)	19
Lewis v. Coughlin, 801 F.2d 570 (2d Cir. 1986)	4
Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (1973), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976)	9
Martin v. University of South Alabama, 911 F.2d 604 (11th Cir. 1990)	14
Morris v. American Nat'l Can Corp., 941 F.2d 710, *opinion withdrawn and substituted*, 952 F.2d 200 (8th Cir. 1991)	14
National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975)	9
Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976)	9
Patterson v. United States, 359 U.S. 495 (1959)	13
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986)	8
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987)	*passim*
Perotti v. Seiter, 935 F.2d 761 (6th Cir. 1991)	14
Peter v. UMW Welfare & Retirement Fund of 1950, 517 F.2d 1275 (D.C. Cir. 1975)	9
Smith v. Freeman, 921 F.2d 1120 (10th Cir. 1990)	14
Soto v. Adams Elevator Equip. Co., 941 F.2d 543 (7th Cir. 1991)	14

TABLE OF AUTHORITIES—Continued

	Page
Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978)	8
United States v. South Buffalo Ry., 333 U.S. 771 (1948)	13
Wildman v. Lerner Stores Corp., 771 F.2d 605 (1st Cir. 1985)	8
STATUTES	
33 U.S.C. § 1365(d) (1988)	3
42 U.S.C. § 1988 (1988)	*passim*
42 U.S.C. § 6972(e) (1988)	3
ACTS	
Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1) (1988)	12
Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988)	12
National Cooperative Research Act of 1984, 15 U.S.C. § 4303(a)(1) (1988)	12
LEGISLATIVE MATERIALS	
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976)	8
S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913	8, 9, 12
MISCELLANEOUS	
2 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[4] (1991)	10, 11
1 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 5.01[1] (1985)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-810

CITY OF BURLINGTON,
Petitioner,

v.

DAGUE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar Association, at the request of President Kennedy, to provide legal representation to African Americans who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of minorities and women in hundreds of class actions relating to employment and housing discrimination, voting rights, equalization of municipal services, and school desegregation.

The Women's Legal Defense Fund ("WLDF") is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex-discrimination cases, public education, and lobbying for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement.

Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in litigating cases arising, *inter alia*, under the Civil Rights Acts of 1866, 1877, and 1964, the Voting Rights Act, and the Fair Housing Act. Similarly, since its inception, the WLDF has relied almost exclusively on members of the private bar to litigate sex-discrimination cases, and lawyers representing clients in WLDF's sex-discrimination cases have brought scores of cases under Title VII. Pursuant to the terms of WLDF's tax exemption, these lawyers receive no compensation for their time except that provided pursuant to fee-shifting statutes, primarily Title VII of the Civil Rights Act of 1964.

These and numerous other federal statutes allow a prevailing plaintiff to recover reasonable attorney's fees. The purpose of these statutes is to attract lawyers to assist those with viable claims who could not otherwise afford legal counsel, by providing reasonable compensation. Indeed, it has been WLDF's experience that lawyers willing to litigate employment discrimination cases are scarce; without the strong incentives the fee-shifting statutes provide, many of those who would challenge discrimination would find it extremely difficult to secure legal representation. Thus, the interpretation of federal fee-shifting statutes is of critical importance to the vindication of civil rights through the federal courts—the goals of the Lawyers' Committee and the WLDF.

STATEMENT OF THE CASE

Respondents are owners of land adjacent to a landfill operated by petitioner City of Burlington, Vermont (the "City"). Respondents brought suit in federal district court against the City, alleging that the City was operating the landfill in violation of a variety of federal and state laws.

In April 1985, respondents retained William W. Pearson and other attorneys to represent them in their lawsuit against the City. The attorneys agreed to take the case with their fee totally contingent on winning. The contingency fee arrangement was used, in part, because respondents had no funds with which to pay for legal services. In addition, respondents would have faced extreme difficulty in finding an experienced counsel willing to represent them with the payment of any fee totally contingent on winning.[1]

Following a bench trial, the district court entered judgment for respondents on some, but not all, of their claims. Pet. App. 59-117a. The district court subsequently awarded attorney's fees to respondents pursuant to 42 U.S.C. § 6972 (e) (1988) and 33 U.S.C. § 1365(d) (1988)—the fee-shifting provisions of the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act, respectively. Pet. App. 130-34a.[2] The court awarded respondents their "lodestar" fee ($198,027.50) and also added a 25% contingency enhancement ($49,506.87), which was intended to compensate respondents' attorney for having assumed the risk that he would receive nothing had respondents not prevailed. The district court explained its

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[1] *See* Affidavits of Heather Briggs and William Pearson in Support of "Plaintiffs' Supplemental Application for Award of Fees and Costs," Civil Action No. 85-269, Appellate No. 90-7544, at 339-42 and 371-76 (filed June 25, 1991).

[2] The two provisions are identically worded and provide for an award of "reasonable attorney and expert witness fees" to any party, whenever appropriate.

decision to award a contingency enhancement by stating that respondents' "risk of not prevailing was substantial under the facts here" and that "absent an opportunity for enhancement, [respondents] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." Pet. App. 132-33a.

The City appealed the entire judgment, including the award of attorney's fees and the risk enhancement, to the United States Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit affirmed the decision of the district court in all respects. Pet. App. 1-37a. With respect to the contingency enhancement issue, the court below analyzed this Court's split, 4-1-4 decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (*"Delaware Valley II"*), and concluded that none of the three opinions in that case was controlling as a matter of law. Pet. App. 36. Turning then to its own precedents, the Second Circuit stated that the critical inquiry was "whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" Pet. App. 37a (quoting *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) and *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). Applying that standard, the appeals court upheld the district court's decision to award a 25% contingency enhancement. *Id.*

On November 18, 1991, the City filed its petition for a writ of certiorari, seeking review of all aspects of the Second Circuit's decision. The Court granted the petition, limiting the question to:

> May a court, in determining a reasonable attorney's fee award under [the two environmental protection statutes], enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

Burlington v. Dague, 112 S. Ct. 964 (1992) (No. 91-810).

SUMMARY OF ARGUMENT

Five years ago in *Delaware Valley II*, a majority of the justices of this Court concluded that a risk enhancement may be awarded in appropriate circumstances. In recognition of that fact, all nine justices joined in one of three separate opinions, each of which attempted to articulate the circumstances when such awards are appropriate and how they should be calculated. The plurality opinion of four justices acknowledged that a majority of the justices would permit risk enhancement in appropriate cases; that plurality opinion, which would have denied such enhancements, also addressed the standards for such awards, stating that "enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification . . . are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728 (White, J., joined by Rehnquist, C.J., Powell, J., and Scalia, J.). Justice O'Connor, joining with the plurality to deny the requested enhancement in that case, nevertheless agreed with four dissenting justices that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions . . . ." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment). The four other justices, in dissent, plainly expressed the view that contingency enhancement is available in appropriate cases. *Id.* at 755 (Blackmun, J., dissenting, joined by Brennan, J., Marshall, J., and Stevens, J.).

The majority of this Court was correct in 1987, and the answer can be no different today: Congress recognized that a reasonable attorney's fee may often include a reasonable contingency enhancement. The purpose of

fee-shifting statutes is to attract sufficient competent counsel to take cases which Congress has determined vindicate important public or personal rights. The statutory standard of "a reasonable attorney's fee" means one sufficient to attract such counsel. This standard leaves courts with appropriate discretion to determine *what is reasonable* under the circumstances of a particular case. A lodestar fee calculated using a *reasonable* non-contingent hourly rate, for hours *reasonably* incurred, obviously includes two key elements of the reasonable overall attorney's fee. But in a case taken on a contingent fee basis—with a risk that the lawyer will receive a fractional fee or no fee at all in the even of an unsuccessful outcome—compensation for this risk of non-payment is also eminently reasonable.

Simply put, lawyers will normally be unwilling to accept cases which present the risk of no payment, for the same fee they would charge if payment is non-contingent. If the evidence establishes that an unenhanced lodestar fee based on the same hourly rate a lawyer charges for non-contingent cases is inadequate to attract sufficient competent counsel to take meritorious cases on a contingent fee basis, such a fee is *not* reasonable. Even petitioner appears to recognize this conclusion, through its repeated assertions that the risk of non-payment is properly to be encompassed within the setting of the hourly rate used to determine the lodestar fee amount. Pet. Br. at 9, 17-18. In this sense, petitioner and respondents differ chiefly as to the point in the overall mathematical formula at which risk enhancement is to be accomplished. What is agreed is that additional compensation for taking a case on a contingent fee basis, whether through an increased hourly rate or an overall contingency enhancement, is often necessary to make a fee reasonable.

While the fractured opinions in *Delaware Valley II* have led to some uncertainty in the lower federal courts as to how to calculate a contingency enhancement, courts across the Nation have been largely in agreement on one

empirical point. That point is that *in the marketplace* for legal services, litigating lawyers seek and obtain additional compensation (that is, above normal non-contingent rates time normal hours) for cases taken on a contingency basis. This is an established economic fact in areas of practice *not* implicated by federal fee-shifting statutes. Permitting risk enhancement under fee-shifting statutes simply affords an equal level of compensation that recognizes this economic fact. This Court has consistently looked to the marketplace for evidence of reasonableness in statutory attorney's fees, and the question of risk enhancement should be no different.

This Court should recognize this basic economic reality and re-affirm the availability of contingency enhancement when the market requires it as part of a reasonable attorney's fee. Only this conclusion will place such cases on an equal footing with other cases in the legal services marketplace, and fulfill the congressional purpose of ensuring that those persons with legitimate grievances but limited financial means have effective access to the courts for vindication of their rights.

ARGUMENT

I. FEDERAL FEE-SHIFTING STATUTES DO NOT FORECLOSE RISK ENHANCEMENTS IN APPROPRIATE CASES IN WHICH THE PREVAILING PARTY HAS BEEN REPRESENTED BY COUNSEL ON A CONTINGENT FEE BASIS

There is nothing in the enactment of the panoply of federal fee-shifting statutes to suggest a foreclosure of risk enhancement in appropriate cases. Certainly, nothing in the text of these statutes supports such a conclusion. Nor does anything in the actions of Congress leading up to the enactment of these laws even remotely suggest such a result. To the contrary, risk enhancement was considered by Congress and was effectively endorsed for statutory fee awards.

A. The Legislative History Of The Civil Rights Attorney's Fees Award Act Of 1976 Reflects Congressional Endorsement Of Risk Enhancement As An Appropriate Consideration Under That And Similar Fee-Shifting Statutes

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 ("Section 1988"), 42 U.S.C. § 1988 (1988), contains detailed congressional guidance on calculating reasonable attorney's fees, and it is persuasive authority for the interpretation of similarly-worded federal fee-shifting statutes.[3] In that legislative history, Congress stated that the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), contained "appropriate standards" for determining a reasonable attorney's fee under federal fee-shifting statutes. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). Among the twelve factors cited in *Johnson* for determining a reasonable attorney's fee is "whether the fee is fixed or contingent." 488 F.2d at 714-19 (factor number 6).

Moreover, as an example of a decision correctly applying the *Johnson* factors, Congress expressly cited the district court decision in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), in which the district court concluded that it "must increase the [lodestar amount] . . . to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature." *Id.* at 686. Thus, the legislative history

[3] *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) ("*Delaware Valley I*"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 737 (dissent); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 611-12 (1st Cir. 1985); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272, 275 (3d Cir. 1985), *modified*, 478 U.S. 546 1019 (1986), *rev'd*, 483 U.S. 711 (1987). *Accord* Pet. Brief at 11; Brief for the United States as *Amicus Curiae* Supporting Petitioner ("U.S. Br.") at 6.

of Section 1988 strongly suggests that Congress intended contingency enhancement to be a proper consideration in arriving at a "reasonable" attorney's fee in cases involving that and similar fee-shifting statutes.

B. In Complex Litigation Cases Prior To 1976, Federal Courts Frequently Allowed Risk Enhancement, And Such Cases Have Been Referenced With Approval By Congress

Congress also stated in the legislative history of Section 1988 that attorney's fees should be equivalent to those awarded "in other types of equally complex Federal litigation, such as antitrust cases. . . ." S. Rep. No. 1011 at 6, *reprinted in* 1976 U.S.C.C.A.N. at 5913. A review of such cases is instructive on the issue of risk enhancement.

In antitrust fee-shifting cases decided prior to the enactment of Section 1988, federal courts awarding attorney's fees frequently permitted an upward adjustment in the fee to compensate for the contingency of payment.[4] Similarly, in other types of complex federal litigation where fee-shifting is permitted, federal courts, in decisions dating as early as 1931, frequently took account of the contingency of payment in determining a reasonable fee.[5] As this long line of cases indicates, "[t]he con-

[4] *See, e.g., Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (1973), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974).

[5] *See, e.g., National Treasury Employees Union v. Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (labor law class action); *Peter v. UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975) (en banc) (labor law class action); *Green v. Transitron Elec. Corp.*, 326 F.2d 492, 496 (1st Cir. 1964) (securities class action); *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (securities class action); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (bankruptcy).

cept of enhancing a court awarded fee to reflect contingency stems from the earliest days of court awarded attorney fees in federal courts . . . ."[6] In fact, this is precisely what Congress was referring to when it mentioned complex federal litigation in the legislative history of Section 1988.

Congress' approving reference to antitrust and complex litigation cases in the legislative history of Section 1988 is thus further evidence of its acceptance of risk enhancement as a consideration in determining reasonable attorney's fees under federal fee-shifting statutes. The empirical evidence across the Nation, as found by federal district courts, is that the legal services marketplace does in fact compensate lawyers who have taken antitrust and other cases on a contingency basis, and have prevailed, at more than their normal hourly rates.[7]

[6] 2 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[4], at 16-154 (1991) (citations omitted) (*"Derfner & Wolf"*).

[7] For instance, in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370), there were a number of affidavits introduced on this point. The joint appendix in that case (cited below as "King Rec.") has been lodged with this Court in connection with the petition for certiorari. Each of the relevant *King* affidavits shows that the lawyer and his or her firm accept contingent fee cases only if there is a reasonable prospect of at least doubling their standard hourly fees in the event of a successful outcome: King Rec. 82-83 (Decl. of Nora Bailey: tax disputes; multiple of two or three); King Rec. 133 (Decl. of John Clifford: general practice including employment and personal injury cases; accepts contingency case only when there is a prospect of recovering triple the normal fees, if successful); King Rec. 146-49 (Decl. of Vincent Curtis, Jr.: comparative license proceedings before the FCC); King Rec. 165-66 (Decl. of Steven Engleberg: civil litigation including personal injury, commercial, and malpractice cases); King Rec. 191-92 (Decl. of Peter Kadzik: various types of complex federal litigation); King Rec. 193-200 (Decl. of Chester Kamin: partial contingent fee arrangement in antitrust case); King Rec. 276-77 (Decl. of Arnold Spevak: represent of tenant associations in condominium conversions, and representation of a commercial client in contesting a local tax assessment); King Rec. 296-98 (Decl. of Robert Weinberg: firm's contingent practice in tort cases); King Rec. 300-01 (Decl. of Kirkwood White: rezoning cases); King Rec. 303-06 (Decl. of Henry Zapruder: tax disputes and litigation).

Continued availability of risk enhancement under federal fee-shifting statutes would merely treat cases under those statutes as the marketplace already treats other, comparable cases. Clearly, Congress wanted attorneys to be compensated on the same basis as in other contingency cases.

C. In Cases After 1976, Federal Courts Have Often Continued To Allow Risk Enhancement, And Congress Has Never Attempted To Overrule Such Cases In Any Fee-Shifting Legislation Enhanced During This Time Period

Contingency enhancement of the lodestar under federal fee-shifting statutes has continued to be widely accepted by federal courts in the years since the Civil Rights Attorney's Fees Awards Act was passed.[8] Over those same years, Congress has also continued to enact a variety of fee-shifting statutes on various subjects.[9] In all of this

[8] *See, e.g., Delaware Valley II*, 483 U.S. at 741 n.6 (Blackmun, J., dissenting). *See also* 2 *Derfner & Wolf, supra*, at 16-156, noting that "the federal courts have been unanimous in awarding increased fees or in holding that the fee for contingent litigation may be increased to account for the risk that counsel will recover no fee at all." As support for the above statement, Derfner & Wolf cite nearly twenty post-1976 cases covering all of the federal circuits. *Id.* n.162. *But see King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (filed Feb. 21, 1992) (No. 91-1370).

[9] Presently, there are attorney fee provisions covering over 200 separate causes of action in the United States Code, and over two-thirds of those federal attorney fee provisions fall into the fee-shifting category. Furthermore, since 1964, the number of fee-shifting statutes in the United States Code has more than doubled. *See* 1 *Derfner & Wolf, supra*, ¶ 5.01[1], at 5-3, 5-6, 5-19 (1985). Many of these fee-shifting statutes were passed after the enactment of Section 1988 by Congress in 1976. *See, e.g.*, National Co-

legislative activity, it is remarkable that in not one of its post-1976 fee-shifting statutes has Congress ever prohibited risk-based enhancement, nor has Congress, in the legislative history of those same fee-shifting statutes, ever commented with disfavor on any of the numerous federal cases in which contingency enhancement was allowed. If Congress had wished to foreclose the use of contingency enhancement as an appropriate factor in court-awarded attorney's fees, it could have (and no doubt would have) done so. This could easily have been accomplished either by direct language in the fee-shifting statutes themselves [10] or by an appropriate comment in the legislative history of the statutes.[11] That Congress has not precluded the widespread practice of risk-based enhancement in any of the many post-1976 fee-shifting statutes is once again strong evidence of its acceptance of contingency enhancement as an appropriate factor in arriving at a reasonable attorney's fee. In sum, petitioner is now asking this Court to shut a door that Congress chose to leave open.

D. This Court Has Already Recognized That Congress Has Not Foreclosed Contingency Enhancement

Amici are far from the first to conclude that Congress has not precluded consideration of risk enhancement in appropriate fee-shifting cases. Indeed, this Court has it-

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operative Research Act of 1984, 15 U.S.C. § 4303(a)(1) (1988); Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1) (1988).

[10] When it wants to, Congress knows how to limit fee awards, as in a per hour dollar limit. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988) (in suits against United States, "attorney fees shall not be awarded in excess of $75 per hour").

[11] *See, e.g.*, S. Rep. No. 1011 at 4, *reprinted in* 1976 U.S.C.C.A.N. at 5911-12, in which Congress specifically noted that its enactment of the Civil Rights Attorney's Fees Award Act of 1976 was "an appropriate response to the *Alyeska* decision," which created "anomalous gaps" in the provision of attorney's fees in civil rights cases. Congress was referring to the case of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

self reached this conclusion. In *Delaware Valley II*, Justice O'Connor specifically concluded that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions . . . ." 483 U.S. at 731. The plurality opinion acknowledged the existence of a majority in favor of risk enhancement by commenting on the circumstances under which it should be permitted. *Id.* at 728.[12] Although Justice O'Connor was writing for herself, the dissenting opinion of Justice Blackmun, which was joined by three other justices, specifically embraced Justice O'Connor's conclusion that risk enhancement had not been foreclosed by Congress.[13]

Thus, a clear majority of this Court has already acknowledged that Congress has never foreclosed consideration of contingency enhancement in an appropriate case. There is no reason for this fundamental conclusion to be reversed five years later.[14] The lower federal courts have had some difficulty in applying the 4-1-4 decision in *Delaware Valley II*, but they have not found fault with the principle that risk enhancement should be available in

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[12] The dissent also recognized that the plurality opinion was not inconsistent with such a conclusion. In addition to embracing Justice O'Connor's conclusion, the dissent noted that the "plurality also recognizes, after a fashion, that fee-shifting statutes might be 'construed to permit supplementing the lodestar in appropriate cases by paying counsel for assuming the risk of nonpayment.'" *Id.* at 735 n.1.

[13] *Id.* at 735 n.1 (citing with approval Justice O'Connor's recognition that "Congress did not intend to foreclose enhancements for contingency in the setting of reasonable attorney's fees.")

[14] The doctrine of *stare decisis* is especially applicable in cases involving the interpretation of statutory law. *See, e.g., Patterson v. United States*, 359 U.S. 495, 496 (1959); *United States v. South Buffalo Ry.*, 333 U.S. 771, 774-75 (1948) ("[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.").

some cases. To the contrary, in the wake of *Delaware Valley II all* circuits had granted risk enhancements in appropriate cases.[15] These same circuits had also rejected

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[15] After having concluded in several previous opinions that contingency enhancements were available in appropriate cases under the standards announced by Justice O'Connor, in *King v. Palmer*, the D.C. Circuit reversed direction and concluded, contrary to the views of every other circuit, that contingency enhancements are never permitted. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370). In numerical order, the other circuit's decisions approving contingency enhancements are: *Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of per se rule, but because "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated") (citation omitted); *Dague v. Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991), *cert. granted in part*, 112 S. Ct. 964 (1992); *Kelly v. Matlack, Inc.*, 903 F.2d 978, 986-87 (3d Cir. 1990) (mandatory prerequisite to award of an enhancement is that plaintiff "establish that without adjustment it would have faced substantial difficulties in finding counsel in the . . . relevant market") (citations omitted); *Craig v. Department of Health & Human Servs.*, 864 F.2d 324, 328 (4th Cir. 1989) (dicta); *Alberti v. Klevenhagen*, 896 F.2d 927, 935-36 (5th Cir.) (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*" which is considered "the authoritative pronouncement of the Court"), *modified*, 903 F.2d 352 (5th Cir. 1990), *cert. granted in part*, 112 S. Ct. 964 (1992); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements."), *opinion withdrawn and substituted*, 952 F.2d 200 (8th Cir. 1991); *Bouman v. Block*, 940 F.2d 1211, 1235-36 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 640 (1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990); *Martin v. University of South Alabama*, 911 F.2d 604, 612 (11th Cir. 1990); *Crumbaker v. Merit Sys. Protection Bd.*, 827 F.2d 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary

contingency enhancement when the trial court concluded that plaintiff had not made the necessary market showing, usually under Justice O'Connor's standard. When risk enhancements were awarded, they were based largely on the large and accumulating body of evidence, and trial court findings, that risk enhancement is necessary in many parts of the country to attract competent counsel to take congressionally-identified classes of cases on a contingent fee basis.

II. A "REASONABLE ATTORNEY'S FEE" OFTEN REQUIRES A RISK ENHANCEMENT FOR A CASE TAKEN BY A LAWYER ON A CONTINGENT FEE BASIS

In light of Congress' clear indication that compensation in fee-shifting cases should be equal to other types of cases, the question then becomes a relatively simple and practical one. Under statutes providing for the award of "a reasonable attorney's fee" to a prevailing party, the issue is whether it is *reasonable* to permit risk enhancement when the case has been taken on a contingent fee basis. Or conversely, the question is whether it is reasonable to expect what one esteemed trial judge observed years ago that "*[n]o one expects*"—that "a lawyer whose compensation is contingent upon his success [should] charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success." [16]

Amici submit that under the statutory standard of a "reasonable attorney's fee," it is inconceivable that risk

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to bring the fee within a range that would attract competent counsel").

[16] *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963) (Wyzanski, J.) (emphasis added), *modified and aff'd sub nom. Gree v. Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964).

enhancement can never be available—regardless of the prevailing market conditions and the substantial difficulties that could confront impecunious plaintiffs with meritorious claims seeking to retain competent counsel. An absolute prohibition of risk enhancement is simply not reasonable as applied to a number of possible situations. If, for instance, the relevant market were to place such a premium on the risk of non-payment that it would be impossible for deserving plaintiffs to find lawyers absent the prospect of risk enhancement, then some such enhancement would plainly be required by statute. In addition, cases of substantial difficulty in the absence of risk enhancement should also qualify under the statutory standard of a "reasonable attorney's fee."

A. Empirical Evidence Of Markets For Legal Services Demonstrates That The Availability Of Risk Enhancement In Appropriate Cases Is Often One Element Of A "Reasonable Attorney's Fee"

Whether viewed as a matter of economics or one of common sense, it seems obvious that risk enhancement is entirely reasonable in order to place contingent fee cases on an equal footing with those cases in which the plaintiff has agreed to pay his or her lawyer, win-or-lose. Even those amici in favor of reversal have conceded that:

> Free legal services [those provided on a contingent fee basis] confer a substantial benefit on a client. In exchange for that benefit, it is reasonable for the attorney to charge a fee to a client, if the case is won, that is greater than the fee a fee-paying client would be charged for the time expended.[17]

Indeed, petitioner itself concedes the fundamental reasonableness of risk enhancement, arguing that the risk of non-payment is properly to be subsumed within the setting of the hourly rate used to generate the lodestar fee

[17] Brief of *Amici Curiae*, The District of Columbia and Several of the States, In Support of Reversal ("D.C. Br.") at 11.

amount.[18] Pet. Br. at 9, 17-18. This is an unconventional ordering of the mathematical formula for determining the "reasonable attorney's fee," but the end result of such an approach would be perfectly consistent with risk enhancement as it has been applied by the lower federal courts following *Delaware Valley II*. Whether taken into account at the beginning or the end of the process, the risk of non-payment in a contingent fee case calls for enhancement of the lodestar fee amount when the market requires such enhancement in order to arrive at a reasonable fee.

This Court need not rely, however, on logic or intuition alone. There is a wealth of economic evidence available that in a number of legal services markets across the Nation, risk enhancement is commonplace. Furthermore, this extensive and uncontradicted body of evidence relates not only to practice in fields covered by fee-shifting statutes, but also to practice in other, comparable areas of complex federal litigation.[19]

The case of *King v. Palmer*, an employment discrimination case arising in the District of Columbia market, is illustrative. In that case, the prevailing plaintiff introduced scores of affidavits on the risk enhancement issue from many different sources, including: (1) counsel in the underlying case; (2) other lawyers, specifically regarding the case; (3) local Title VII and employment law lawyers in private practice; (4) lawyers who practice in other areas of complex federal litigation in the District of Columbia, sometimes on a contingent fee basis; (5)

[18] There is absolutely no evidence that normal hourly rates include a factor for the risk of nonpayment for losing cases. In fact, the unrebutted evidence in many cases establishes that normal hourly rates are based exclusively on the notion that they are non-contingent with no factor for the risk of nonpayment because of unsuccessful litigation.

[19] Thus, contrary to the concerns of some, this evidence is not merely demonstrative of judicial fee-shifting determinations driving the marketplace, instead of vice versa. *See* U.S. Br. at 19-21; D.C. Br. at 5, 24 (citation omitted).

lawyers from civil rights organizations; (6) *pro se* plaintiffs in similar cases, who were turned down in seeking competent counsel on a contingency basis; and (7) a representative of the bar lawyer referral service. The affiants represented the billing practices of more than 500 lawyers from almost every facet of the local legal practice—large firms, solo practitioners, partners, associates, and public interest practitioners—and a significant part of the entire District of Columbia bar.

Furthermore, those affidavits contained exactly the type of market-oriented, empirical evidence that Justice O'Connor's test in *Delaware Valley II* requires to make an accurate determination. All of the evidence in *King v. Palmer* showed that lawyers who took contingent fee cases in the District of Columbia during the relevant time frame required at least 100 percent risk enhancement as an inducement to do so. This was demonstrated to be true both of employment law litigators[20] and of lawyers who handle other types of complex federal litigation not reached by fee-shifting statutes.[21] This evidence led to the D.C. Circuit's panel decision in favor of risk enhancement of 100 percent in that case, a decision that was subsequently overturned only by the legal conclusion of that court en banc that contingency enhancement is *never* available, as a matter of law, *King v. Palmer*, 906 F.2d 762 (1990), *vacated and reversed en banc*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370). Under *King*, even if the parties had stipulated or the trial court had found that *no lawyers* would take meritorious cases on a contingent fee basis without the possibility of an

[20] *See* King Rec. 92-93 (Decl. of Joel Bennett); King Rec. 168-69 (Decl. of John Erickson: at least 100 percent enhancement); King. Rec. 266 (Decl. of Gary Simpson: would accept a discrimination case on a contingent basis only with a 100 percent contingency bonus).

[21] *See supra* at 10-11, note 7.

enhancement if successful, no contingency enhancement could be awarded.[22]

Notably, market-based evidence comparable to that in the District of Columbia has been brought forward elsewhere as well. *See, e.g., Bouman v. Block, supra*, 940 F.2d at 1236 (9th Cir. 1991) (Los Angeles: remanding for determination of multiplier between 1.3 and 2.0); *Lattimore v. Oman Constr.*, 868 F.2d 437, 439 (11th Cir.), *reh'g denied en banc*, 875 F.2d 874 (11th Cir. 1989) (Alabama: 100% risk enhancement); *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988) (San Francisco: multiplier of 2.0).

In contrast to the hard evidence available favoring the availability of contingency enhancement, petitioner and amici arguing in petitioner's support rely only on bald factual assertions. For instance, they proclaim that:

- "Compensation at a reasonable hourly rate for all hours worked will be sufficient to attract competent counsel." Pet. Br. at 18-19.
- "A contingency enhancement over the lodestar is not necessary to enable plaintiff with a case involving a fair chance of success to obtain competent counsel." U.S. Br. at 17.
- "There is no shortage of lawyers willing to take their cases on a non-fee-paying basis." Brief of the Washington Legal Foundation and the Allied Education Foundation as *Amici Curiae* In Support of Petitioner ("WLF Br.") at 17.

Tellingly, *none of these contentions is accompanied by any factual support*—either from the record below or from

[22] Even if the trial court made a factual finding based on uncontradicted evidence from the local market that lawyers *universally* charge higher hourly rates for contingent cases (*i.e.* an enhancement) than for cases in which payment is certain, *King* holds that contingency enhancements under statutes which require award of "reasonable attorney's fees" are barred as a *matter of law*—concluding that regardless of the facts, a risk enhancement can never be reasonable.

elsewhere. Indeed, the *only* factual references contained in petitioner's entire brief are two strained criticisms of the affidavits filed below by respondents. Pet. Br. at 22-23 n.3. The Brief for the United States is *entirely devoid* of any empirical evidence. This should not be surprising, for the available evidence thoroughly contradicts these hypotheses. The factual showings made in cases such as *King v. Palmer* are unrebutted as to the need for risk enhancement as an inducement to competent lawyers to take many cases on a contingent fee basis. In fact, in the instant case, in *King v. Palmer*, and in virtually every other reported case, the losing defendant has been unable to identify even a single lawyer, much less a pool of competent attorneys, willing to take such cases solely on a contingent lodestar fee basis with no possibility of risk enhancement.

Having no evidence of their own upon which to draw, petitioner and its supporters resort to wholesale attack on the large body of evidence regarding the need for contingency enhancement in many cases. Affidavits of practicing lawyers, the evidentiary staple of all other aspects of attorney's fees litigation, are scorned as inherently unreliable. For instance, amici maintain that affidavits submitted in risk enhancement cases "should be viewed with an extremely critical eye." [23] In effect, the critics of these affidavits invite this Court to make an across-the-board credibility determination, reversing the factual findings of dozens of federal trial courts—and to do so with no explanation of what other evidence might be more suitable or persuasive.

Yet evidence of the case intake and billing practices of litigating lawyers is absolutely essential to what is "reasonable" in the way of risk enhancement under the many fee-shifting statutes that adopt the reasonableness stand-

[23] WLF Br. at 13. The District of Columbia asserts flatly that attorney affidavits "are anecdotal in content and self-interested in motivation." D.C. Br. at 17.

ard. When the working of the financial services marketplace is at issue, it is logical to look in large part to financial institutions for evidence of their economic behavior. When agricultural markets are at issue, it is sensible to look to farmers for such evidence. There is no reason it should be any different for legal services and lawyers. Trial judges are perfectly capable of assessing the credibility and weight of attorney affidavits in this area, just as they handle a multitude of other types of economic evidence.[24]

In truth, what petitioner and its supporters resist is less the form of the evidence than the *empirical conclusion* dictated by it. Based on the evidence taken from various legal services markets across the country, many trial courts have reached a common factual conclusion, which has been affirmed by almost all of the courts of appeals. That inescapable fact is that the prospect of significant risk enhancement *is* often necessary as an inducement to lawyers to take on cases on a contingent fee basis. The marketplace is the most reliable benchmark of reasonableness, and should be the primary source of guidance in determining the availability and magnitude of contingency enhancements. A market-oriented approach permits judges to make their decisions on risk enhancement based on the economic evidence available, rather than requiring them to substitute their own values for the private valuations that markets exist to balance out. For other issues arising under fee-shifting statutes, a market-oriented approach has predominated. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (reasonable hourly rate is the prevailing market rate in the relevant legal

[24] Perhaps respondents would prefer to place on prevailing plaintiffs the burden of producing formal econometric studies of the marketplace for legal services. But the empirical data for such studies would still come largely from lawyers. In addition, there is no reason to go to such lengths and expense. As this Court has held, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

community); *Hensley v. Eckerhart*, 461 U.S. at 437 (number of hours reasonably expended determinable by reference to "billing judgment" common in private practice). The market is equally trustworthy with respect to risk enhancement.

B. None Of The Policy Arguments Leveled Against Risk Enhancement Is Of Any Force To Rebut The Congressional Mandate For The Award Of "Reasonable Attorney's Fees"

Petitioner and its supporting amici raise a number of policy arguments against the availability of risk enhancement under any circumstances. None of these contentions is well grounded, and certainly none of them is of sufficient weight to override the congressional mandate for the awarding of "reasonable attorney's fees" to prevailing plaintiffs in statutorily selected cases.

The first policy argument is that risk enhancement compensates "persons who were not 'prevailing' parties." [25] The theory underlying this argument appears to be that contingency enhancement is not truly compensation for the case at hand, but compensation for other cases (unidentified) which may already have been lost. U.S. Br. at 14. But this is all legerdemain. No one is asking that anyone but "prevailing plaintiffs" be entitled to any attorney's fees awards under fee-shifting statutes, let alone enhancement of such awards. Moreover, the availability of fee enhancement for the risk of non-payment does not depend under existing law, and .would not depend on whether the plaintiff has ever been involved in other cases, winning or losing. The connection to actual losing cases is only hypothetical. Nor does or would risk enhancement depend on the prior involvement of the prevailing plaintiff's lawyer in lost cases—risk enhancement could

[25] U.S. Br. at 13 (removing initial capitalization from argument heading); *see also* Pet. Br. at 10 ("results in paying plaintiff's counsel for losing efforts"); D.C. Br. at 8 (risk enhancement as "a defense-paid subsidy for unsuccessful litigation").

and should be available for a lawyer's first case, if otherwise appropriate. Properly understood, the purpose of risk enhancement is not to create a form of back-door compensation for other, undeserving efforts—it is to compensate for the risk that the *instant* case might have been lost and no fee paid to the lawyer.

The second policy argument is that contingency enhancement is improper because it inevitably compensates the prevailing plaintiff for the risk of winning or losing the individual case: " 'if the courts cannot . . . directly [consider the risks undertaken by an individual fee applicant], how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case.' " [26] This contention, however, misses the key point of Justice O'Connor's pivotal concurrence in *Delaware Valley II*: that risk enhancement should be "based on the difference in market treatment of [contingency] cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment).[27] There is a substantial difference between a trial court taking it upon itself to determine the risks of a particular case, especially *ex post facto*, and that same trial court weighing evidence of how the market evaluates the risk of nonpayment in certain types of cases. Case-by-case review would be far more burdensome, far less reliable, and far more open to subjectivity on the part of the trial judge. Review of *market* evidence obviates the need for the trial judge to engage in such a particularized evaluation. Under Justice O'Connor's approach, the market is looked to —as it should be—as the process for the filtering and balancing of interests and demands of various parties. Market-oriented analysis, regarding contingent fee practice both under fee-shifting statutes and in other areas where such statutes do not apply, provides an objective

[26] WLF Br. at 14 (quoting *King v. Palmer*, 950 F.2d 771, 780 (1991); *see also id.* at 8-9; U.S. Br. at 22.

[27] *See also id.* at 730-31 (plurality opinion); *id.* at 745-46 (dissent).

basis for reasonable and consistent determinations of risk enhancement.

Last, it is contended that "there is no middle ground between routinely awarding contingency enhancements or not awarding them at all." WLF Br. at 16-17. If this were true, there would be a far greater regularity of risk enhancement than has been experienced to date. A number of courts have either declined to award risk enhancement or have awarded relatively minimal percentages of risk enhancement. Variations between different markets for legal services—in geography, in classes of cases, and in time—have proven to be significant. The lower courts remain free at all times to take such market differences into account, and to rule accordingly based on the evidence presented. The frequency and magnitude of risk enhancement will ultimately depend upon the evolution of legal services marketplaces and on the evidence presented in specific cases.[28]

If, over time, the prevailing circumstance emerges across the nation that competent attorneys are willing to take on cases on a contingent fee basis and without the prospect of risk enhancement, and this can be proven in court, then risk enhancement will gradually be rendered obsolete. But, in fact, the trend has been exactly in the opposite direction. For instance, the record in *King v. Palmer* is replete with evidence establishing that the number of attorneys willing to accept contingent Title VII cases has diminished greatly. No one would welcome more than

[28] It is conceivable, too, that market practice could evolve so as to build a risk enhancement factor into the hourly rate only for those cases taken on a contingent fee, with that hourly rate then used to set the "lodestar" fee amount without need for further risk enhancement. But that is certainly not the current practice. Furthermore, there is absolutely no evidence that lawyers' normal hourly rates, set for clients who pay win-or-lose, contain any imbedded factor for contingency enhancement. Neither such clients, nor defendants in fee-shifting cases litigated on a non-contingent fee basis, would tolerate the use of such increased rates for their cases, in which there is no risk of non-payment based on adverse outcomes.

amici the day when all plaintiffs with legitimate grievances are readily able to locate lawyers willing to take their cases to court. This Court, however, should not ignore the current state of affairs and anticipate such a day. Risk enhancement must continue to be available when the market requires such enhancement as part of a reasonable attorney's fee.

CONCLUSION

For the foregoing reasons, the Court should reaffirm the availability of risk enhancement for certain attorney's fees awards under federal fee-shifting statutes, and should affirm the decision and order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ROGER E. WARIN
(Counsel of Record)
JERALD S. HOWE, JR.
D. BENSON TESDAHL
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DONNA LENTHOFF
WOMEN'S LEGAL
DEFENSE FUND
2000 P Street, N.W.
Washington, D.C. 20036
(202) 986-2600

HERBERT M. WACHTELL
Co-Chairman
WILLIAM H. BROWN, III
Co-Chairman
NORMAN RADLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

Attorneys for Amici Curiae
Lawyers' Committee and
Women's Legal Defense Fund

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October Term, 1991

CITY OF BURLINGTON,

Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A. BESSETTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF ALABAMA EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION; JOAQUIN G. AVILA; COOPER, MITCH, CRAWFORD, KUYKENDALL & WHATLEY; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; JAY-ALLEN EISEN LAW CORPORATION; ERICKSON, BEASLEY, HEWITT & WILSON; LAW OFFICE OF ALAN B. EXELROD; LAW OFFICES OF RICHARD B. FIELDS; FERGUSON, STEIN, WATT, WALLAS, ADKINS & GRESHAM, P.A.; JULIAN, OLSON & LASKER, S.C.; LEGAL SERVICES FOR PRISONERS WITH CHILDREN; LEGAL SERVICES OF NORTHERN CALIFORNIA; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.;

(Amici Continued on Inside Cover)

ROSEN, BIEN & ASARO
SANFORD JAY ROSEN
Counsel of Record
ANDREA G. ASARO
ADELA B. KARLINER
STEPHEN M. LIACOURAS
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

(Additional Counsel Inside Cover)

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; PATTERSON, HARKAVY, LAWRENCE, VAN NOPPEN & OKUN; RICHARD M. PEARL; PRISON LAW OFFICE; PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; PUBLIC ADVOCATES, INC.; AND ROSEN, BIEN & ASARO

IN SUPPORT OF RESPONDENTS

STEVEN R. SHAPIRO
JOHN A. POWELL
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

LEON FRIEDMAN
Co-counsel for the American Civil Liberties Union Foundation
148 East 78th Street
New York, NY 10021
(212) 737-0400

RICHARD LARSON
Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

TERISA E. CHAW
National Employment Lawyers Association
535 Pacific Avenue
San Francisco, CA 94133
(415) 397-6335

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. In Enacting Fee-shifting Statutes, Congress has Mandated that the Amount of Attorney's Fees Awarded to Prevailing Plaintiffs be Determined in Accordance with Relevant Private Markets for Legal Services 3

II. Application of Market Principles and Practices Mandates that Prevailing Parties in Actions Brought Under Fee-shifting Statutes be Awarded Contingent Risk Enhancers 8

III. Justice O'Connor's Approach in *Delaware Valley II* is a Fair and Workable Way to Determine When Risk Enhancement is Necessary to Assure that the Prevailing Plaintiff is Awarded a Reasonable Attorney's Fee in a Fee-Shifting Case 17

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

Cases *Page*

Arenson v. Board of Trade,
372 F.Supp. 1349 (N.D. Ill. 1974) 14

Bernardi v. Yeutter,
951 F.2d 971 (9th Cir. 1991) 20

Blanchard v. Bergeron,
489 U.S. 87 (1989) 6

Blank v. Talley Indus.,
390 F.Supp. 1 (S.D.N.Y. 1975) 13

Blum v. Stenson,
465 U.S. 886 (1984) 4, 5, 6

Bouman v. Block,
940 F.2d 1211 (9th Cir. 1991) 20

Brandon v. Holt,
469 U.S. 464 (1985) 5

In re Cenco, Inc. Sec. Litig.,
519 F.Supp. 322 (N.D. Ill. 1981) 14

Cherner v. Transitron Elec. Corp.,
221 F.Supp. 55 (D.Mass. 1963), *modified on other grounds*, 326 F.2d 492 (1st Cir. 1964) 14

City of Detroit v. Grinnell Corp.,
495 F.2d 448 (2nd Cir. 1974) 13

City of Riverside v. Rivera,
477 U.S. 561 (1986) 6

Conklin v. Lovely,
834 F.2d 543 (6th Cir. 1987) 18

In re Coordinated Pretrial Proceedings,
410 F.Supp. 680 (D. Minn. 1975) 13

County of Suffolk v. LILCO,
710 F.Supp. 1477 (E.D.N.Y. 1989), *aff'd in part, rev'd in part on other grounds*,
907 F.2d 1296 (2d Cir. 1990) 14

Crawford Fittings Co. v. J.T. Gibbons, Inc.,
482 U.S. 437 (1987) 6

Davis v. County of Los Angeles,
8 EPD ¶ 9444 (C.D. Cal. 1974) 4

D'Emanuele v. Montgomery Ward & Co. Inc.,
904 F.2d 1379 (9th Cir. 1990) 21

Dayton Board of Education v. Brinkman,
443 U.S. 526 (1979) 5

Department of Labor v. Triplett,
494 U.S. 715 (1990) 10

Evans v. Jeff D,
475 U.S. 717 (1986) 6

Fadhl v. City and County of San Francisco,
859 F.2d 649 (9th Cir. 1988) 19, 20

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 5

In re General Pub. Utils. Sec. Litig.,
[1983-1984 Transfer Binder] Fed. Sec. L.
Rep. (CCH) ¶99,566 (D. N.J. Nov. 16, 1983) . 14

Green v. Transitron Elec. Corp.,
326 F.2d 492 (1st Cir. 1964) 14

In re Gypsum Cases,
386 F.Supp. 959 (N.D. Cal. 1974), aff'd,
565 F.2d 1123 (9th Cir. 1977) 13

Hasbrouck v. Texaco, Inc.,
879 F.2d 632 (9th Cir. 1989) 5, 20

Hendrickson v. Brendstad,
934 F.2d 158 (8th Cir. 1991) 19

Hidle v. Geneva County Bd. of Educ.,
681 F.Supp. 752 (M.D. Ala. 1988) 15

Islamic Center of Miss. v. Starkville,
876 F.2d 465 (5th Cir. 1989) 18

Jackson v. Rheem Mfg.,
904 F.2d 15 (8th Cir. 1990) 19

Johnson v. Georgia Highway Express,
488 F.2d 714 (5th Cir. 1974) 4, 5

Keith v. Volpe,
86 F.R.D. 565 (C.D. Cal. 1980) 14

King v. Board of Regents,
748 F.Supp. 686 (E.D. Wis. 1990) 19

Lapina v. Williams,
232 U.S. 78 (1914) 7

Lattimore v. Oman Constr. Co.,
714 F.Supp. 1178 (N.D. Ala. 1989), *aff'd*,
868 F.2d 437 (11th Cir. 1989) 15, 21

Leigh v. Eagle,
714 F.Supp. 1465 (N.D. Ill. 1989) 19

Leroy v. City of Houston,
831 F.2d 576 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988) 18

Lindy Bros. Bldrs., Inc. of Phila. v. American Radiator & Standard Sanitary Corp.,
487 F.2d 161 (3rd Cir. 1973) 13

McGuire v. Sullivan,
873 F.2d 974 (7th Cir. 1989) 19

Merritt v. Mackey,
932 F.2d 1317 (9th Cir. 1991) 21

Missouri v. Jenkins,
491 U.S. 274 (1989) 5, 6

Morris v. American National Can Corp.,
952 F.2d 200 (8th Cir. 1991) 19

Municipal Auth. of Bloomsburg v. Pennsylvania,
527 F.Supp. 982 (M.D. Pa. 1981) 14

Oviatt v. Pearce,
92 D.A.R. 723, 728 (9th Cir. Jan. 16, 1992) . . 20

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
478 U.S. 546 (1986) 3

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483 U.S. 711 (1987) . . . . . *passim*

Perlman v. Feldmann,
160 F.Supp 310 (D. Conn. 1958) 14

Purdy v. Security Sav. and Loan Assoc.,
727 F.Supp. 1266 (E.D. Wis. 1989) 15

Richardson v. Alabama State Bd. of Educ.,
935 F.2d 1240 (11th Cir. 1991) 21

Rievman v. Burlington N. Ry. Co.,
118 F.R.D. 29 (S.D. N.Y. 1987) 15

Skelton v. General Motors Corp.,
860 F.2d 250 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) 19

Soto v. Adams Elevator Equipment Co.,
941 F.2d 543 (7th Cir. 1991) 19

Stanford Daily v. Zurcher,
64 F.R.D. 680 (N.D. Cal. 1974) 4

Steinberg v. Hardy,
93 F.Supp. 873 (D. Conn. 1950) 14

Swann v. Charlotte-Mecklenburg Board of Education,
66 F.R.D. 483 (W.D. N.C. 1975) 4

In re Union Carbide,
724 F.Supp. 160, 169 (S.D.N.Y. 1989) 16

U.S. v. City and County of San Francisco,
748 F.Supp. 1416 (N.D. Cal. 1990) 12

United States v. Great N. R. Co.,
287 U.S. 144 (1932) 7

Venegas v. Mitchell,
495 U.S. 82 (1990) 6

Wolf v. Planned Property Management,
735 F.Supp. 882 (N.D. Ill. 1990) 19

STATUTES

15 U.S.C. § 13(a) (1988) 20

20 U.S.C. §§ 1400-1485 (1988) 7

22 U.S.C. § 277d-21 (1988) 8

28 U.S.C. §§ 2412(d)(1)(A) and (2)(A) (1988) 7

28 U.S.C. § 2678 (1988) 8

30 U.S.C. § 901 *et seq* (1988) 10

33 U.S.C. 1365(d) (1988) 1, 3

42 U.S.C. § 300aa-15(b) (1988) 8

42 U.S.C. §406(b)(1) (1988) 8

42 U.S.C. § 1988 (1988) . . . . . *passim*

42 U.S.C. § 6972(e) (1988) 1, 3

48 U.S.C. § 1424c(f) (1988) 8

50 U.S.C. app. § 1985 (1990) 8

OTHER AUTHORITY

Class Action Reports
July-Aug., Sept.-Oct., 1990, 249 14

S. Rep. No. 94-1011 (1976) 4

H.R. 5757, 98th Cong. 2d Sess. (1984) 7

H.R. 3181, 99th Cong. 1st Sess. (1985) 7

Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. Review of Law & Social Change 535, 537-38 (1990) 12

Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 Lab. Law. 63 (1989) 12

Model Code of Professional Responsibility
DR-2-106(B) 9

Model Rules of Professional Responsibility, Rule 15 . 9

INTEREST OF *AMICI CURIAE*[1/]

Amici are not-for-profit legal services organizations, private law firms and sole practitioners from throughout the United States. The legal services organizations engage in a wide variety of public interest litigation. They depend on reasonable attorney's fees awards, pursuant to fee-shifting statutes, to finance their litigation. The enhancement of their attorney's fees to compensate for the risk of taking matters on a contingency basis enables them to attract cooperating counsel from private law firms. Without the ability to attract private counsel, they would be unable to obtain representation for many of the prospective clients who seek their legal assistance.

The private law firm and sole practitioner *amici* devote a substantial portion, if not all, of their practices to public interest litigation under a variety of fee-shifting statutes. This litigation is virtually always undertaken on a contingency basis. If contingent risk enhancers were not available to compensate these private attorneys when they prevail, economic necessity would force many of them to turn down meritorious cases in favor of hourly-fee paying clients.

More detailed Statements of Interest for each *amicus* are contained in the Appendix attached to the Brief.

SUMMARY OF ARGUMENT

Many public interest statutes, including the Solid Waste Disposal Act, the Clean Water Act and a host of others, contain "fee-shifting" provisions that entitle

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[1/] Letters of consent to the filing of this Brief have been lodged with the Clerk of the Court, pursuant to Rule 37.3.

prevailing plaintiffs to recover their reasonable attorney's fees, in addition to whatever other relief they may be awarded in the course of litigation. The determination that a "reasonable" attorney's fees award in a case brought under a fee-shifting statute includes an enhancement for contingent risk reflects the recognition by many courts that legal services, like other services, are priced in accordance with the principles and practices of the marketplace.

The legislative history of Section 1988 of the Federal Civil Rights Attorney's Fee Award Act of 1976 -- which sets the standard for attorney's fees awards to prevailing parties in cases brought under federal fee-shifting statutes -- reveals Congress' intent that the marketplace determine the amount of a reasonable attorney's fees award. Market analysis, in turn, dictates that an attorney who prevails on behalf of a plaintiff in an action brought under a fee-shifting statute should be compensated not only for the time expended prosecuting the action but also for the risk associated with bringing the litigation. Without the prospect of contingent risk enhancement, competent attorneys, operating in accordance with market principles, will decline to undertake such litigation, and those persons intended to be benefitted by the statutes containing the fee-shifting provisions will be disserved.

Five Justices of this Court have acknowledged the crucial role that contingent risk enhancement plays in the legal services market. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*) (O'Connor, J. concurring; Blackmun, J. dissenting). In the five years that have elapsed since *Delaware Valley II*, the two-part test set out in Justice O'Connor's concurring opinion has proved both workable and fair. As applied by numerous lower courts, it has yielded reasonable attorney's fees awards, while furthering Congress' essential purpose: that those persons intended to

be benefitted by fee-shifting legislation have access to competent counsel willing and able to represent them.

The principal concern of the plurality in *Delaware Valley II* -- that an enhancement for a contingent risk undermines the "prevailing party" requirement by compensating counsel who prevail in one case for other cases in which they do not prevail -- is dispelled both by sound economic analysis and by the post-*Delaware Valley II* experiences and findings of federal courts in a number of jurisdictions. These decisions fully validate what the legislative history of Section 1988 teaches: when the market is the measure of a reasonable attorney's fees award, a contingent risk enhancer is necessary and appropriate to fulfill Congress' intent that the public interest statutes it enacts be enforced, and that competent counsel be reasonably and fairly compensated for their efforts to that end.

ARGUMENT

I. In Enacting Fee-shifting Statutes, Congress has Mandated that the Amount of Attorney's Fees Awarded to Prevailing Plaintiffs be Determined in Accordance with Relevant Private Markets for Legal Services.

Although the instant case arises under the attorney's fee provisions of Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), and Section 505 of the Clean Water Act, 33 U.S.C. § 1365(d), this Court has determined that the fee-shifting standards applicable to those statutes are the same as those applicable under Section 1988 of the Federal Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-62 (1986) (*Delaware Valley I*). Central to the inter-

pretation of all public interest attorney's fees statutes, therefore, is Senate Report No. 94-1011 (1976), which sets out the legislative history of Section 1988. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 893-95 (1984). Senate Report No. 94-1011 bears on all facets of fee setting under Congress' fee-shifting statutes, including risk enhancement. *See, e.g., Delaware Valley II*, 483 U.S. at 723-24. The most relevant portion of Senate Report No. 94-1011 states:

> It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be non-pecuniary in nature. The appropriate standards, *see Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 FRD 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 EPD ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 FRD 483 (W.D. N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.

S. Rep. No. 94-1011 at 6 (1976). The standard set out in *Johnson v. Georgia Highway Express* is stated in terms of twelve factors: (1) The time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) *whether the fee is fixed or contingent;* (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-719. The legislative history of Section 1988 thus embraces a standard that includes risk enhancement.

It is noteworthy that in enacting Section 1988 Congress used as a reference point the highly contingent field (for plaintiffs' counsel) of federal antitrust litigation. Given that reference, the antitrust field's market model should guide "the amount of fees awarded under" Section 1988 and similar statutes, absent express statutory language or clear legislative history to the contrary. *See, e.g., Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 636-37 (9th Cir. 1989) (applying the analysis of Justice O'Connor, concurring, in *Delaware Valley II* to fee enhancement under the Clayton Act in a Robinson-Patman case).

Consistent with the legislative history of Section 1988, this Court has repeatedly ruled, with rare exclusively statutory exceptions, that the principles and practices of the market determine both the amount and the components of attorney's fees awards under fee-shifting statutes. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (in determining how certain attorney's fees award are to be calculated, this Court has "consistently looked to the marketplace as [its] guide to what is reasonable"). Thus, under Section 1988 this Court has held that private market practices mandate that the prevailing party be awarded compensation for the work of salaried attorneys and paralegals at their market hourly billing rates, rather than on an actual cost basis. *See Blum v. Stenson*, 465 U.S. at 894-895; *Missouri v. Jenkins*, 491 U.S. at 287-89. This Court has also held that both hourly rates and compensable time are determined essentially as the market determines them, subject to adjustment on the basis of considerations such as the complexity and novelty of the legal issues and the quality of the services rendered. *See, e.g., Missouri v. Jenkins*, 491 U.S. at 285-289, *Blum v. Stenson*, 465 U.S. at 894-95.

In addition, this Court has recognized that market considerations mandate an upward adjustment of fees to compensate for delay. *Jenkins v. Missouri*, 491 U.S. at 283-84. Furthermore, the Court has validated market practices that permit attorneys to be awarded fees that exceed the amount provided in contingency fees contracts, *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989); that permit attorneys to collect fees from damages, in addition to court awards of fees, *Venegas v. Mitchell*, 495 U.S. 82 (1990); and that permit plaintiffs in certain class actions to enter into settlements that include waivers of attorney's fees, *Evans v. Jeff D*, 475 U.S. 717 (1986). Finally, the Court has held that full attorney's fees are to be awarded to prevailing plaintiffs even when their fees exceed by multiples the amount of the damages award. *See City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986).

With respect to contingent risk enhancement, Justice White's plurality opinion in *Delaware Valley II*, while limiting the availability and the amount of contingent risk enhancers, acknowledges the relevance of the market. 483 U.S. at 726-27. The plurality's only real concern with full contingent risk enhancement is that an award enhanced to take account of risk might compensate prevailing plaintiffs' attorneys for work they performed in other cases in which their clients did not prevail. *Id.* at 724-25. As argued more fully in Section II, however, the contingent risk enhancer *is* the price that *the market* dictates plaintiff's counsel should be paid for the services he or she rendered *in the case in which the plaintiff prevailed*.

Congress is fully able, if it wishes, to delineate an approach other than that of market analysis. *See Crawford Fittings Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). Notably, Congress has demonstrated its ability explicitly to preclude the award of contingent risk enhancers, if it so intends, as it did in the Individuals with

Disabilities Education Act, ("IDEA"), 20 U.S.C. §§ 1400-1485 (1988). As provided by Sections 1415(e)(4)(B) and (C), a court may award "reasonable attorneys' fees" to prevailing plaintiffs, but "[n]o bonus or multiplier may be used in calculating the fees awarded . . . ."

Further, it is relevant that Congress has considered and rejected several attempts to eliminate enhancers, at least against government defendants. In 1982, Senator Hatch proposed an amendment to Section 1988 that would have prohibited "awards based on contingency factors or enhancers." S. 585, 97th Cong. 2d Sess. § 722A (1982). In addition, four bills were introduced that would have imposed a $75 per hour cap on attorney's fees awarded to plaintiffs who prevailed against government defendants, and eliminated enhancers under all federal fee-shifting provisions. Neither Senator Hatch's amendment nor any of the proposed bills passed. *See* S. 2802, 98th Cong., 2d Sess. (1984); H.R. 5757, 98th Cong. 2d Sess. (1984); S. 1580, 99th Cong. 1st Sess. (1985); and H.R. 3181, 99th Cong. 1st Sess. (1985). As recently as last year, an amendment that would have limited attorney's fees to 20% of the total award was proposed as part of the Civil Rights Act of 1991. 137 Cong. Rec. S 15338-39 (daily ed. Oct. 29, 1991). That proposed amendment also failed.[2/]

Congress has also set limits or caps on attorney's fees awards under specific statutory schemes. *See e.g.*, 28 U.S.C. §§ 2412(d)(1)(A) and (2)(A)(1988) (fee awards under the Equal Access to Justice Act "shall be based upon prevailing market rates . . . except that . . . attorney fees shall not be awarded in excess of $75 per hour . . .); 42

[2/] Congress' rejection of proposed amendments indicates that it does not intend the law to include the provisions embodied in the rejected amendments. *C.f.* Lapina v. Williams, 232 U.S. 78 (1914); United States v. Great Northern R. Co., 287 U.S. 144, 155 (1932).

U.S.C. § 300aa-15(b) (1988) (fee awards under the National Vaccine Injury Compensation Act of 1986 limited to $30,000); 28 U.S.C. § 2678 (1988) (fees under Federal Tort Claims Act limited to 20% of administrative settlement; 25% of judgment or settlement); 42 U.S.C. §406(b)(1) (1988) (fees under Social Security Act limited to 25% of award); 22 U.S.C. § 277d-21 (1988) (fees under American-Mexican Chamizal Convention Act of 1964 limited to 10%); 48 U.S.C. § 1424c(f) (1988) (fees for claims regarding land under Organic Act of Guam limited to 5% of award); 50 U.S.C. app. § 1985 (1990) (fees under Japanese-American Evacuation Claims Act of 1948 limited to 10% of award).

Because Section 1988 and the statutes at issue here do not by their terms preclude the use of contingent risk enhancers, market practices are controlling. As described more fully below, those practices are plainly consistent with the award of attorney's fee enhancers, at the courts' discretion and under appropriate circumstances.

II. Application of Market Principles and Practices Mandates that Prevailing Parties in Actions Brought Under Fee-shifting Statutes be Awarded Contingent Risk Enhancers.

The difficulty in determining appropriate attorney's fees awards in statutory fee-shifting cases is in part attributable to the confusion over the nomenclature used. Many of the cases refer to "windfalls," "bonuses" or "multipliers." The impression that this language conveys is that a lawyer who seeks an enhancement for contingent risk after prevailing in a fee-shifting case is somehow seeking more than is properly due.

But that impression is false and misleading. As five Justices in *Delaware Valley II* recognized, lawyers who bring actions under fee-shifting statutes are simply operating under the normal rules of the market in which they operate. All practicing litigation attorneys know that they charge a different rate depending on whether they will be paid on a regular hourly basis or only if they win. Whether the case is an antitrust case in Seattle, a personal injury case in Boston, a securities fraud case in New York, a patent infringement case in Philadelphia, an employment discrimination case in San Francisco, a breach of contract case in St. Louis or an environmental case in Vermont, lawyers who are not assured of being compensated for their efforts must, and do, negotiate their fees accordingly.

It is not a question of getting a "windfall" or a "bonus" if one succeeds. Rather, the business and economic reality is that statutory fee-shifting cases must be treated differently, from a fees perspective, from cases for which counsel is compensated on a risk-free hourly basis. In the unregulated market for legal services, virtually all lawyers charge either hourly rates that must be paid regardless of outcome, or contingency fees that are paid only if the lawyer succeeds. Contingency fees inevitably are higher, so that prevailing lawyers are compensated for the additional risk of a negative outcome. The American Bar Association ("ABA") which monitors and enforces fee-setting practices in the legal profession, fully authorizes attorneys to seek compensation for contingent risk. Disciplinary Rule No. 2-106(B) of the ABA Model Code and Rule 15 of the ABA Model Rules list the following eight factors for determining the reasonableness of attorney's fee awards, including contingent risk:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) *Whether the fee is fixed or contingent.* . . .

(Emphasis supplied.) Lawyers thus reasonably and properly demand, and the market dictates, that in fee-shifting litigation they be compensated for the contingent risk inherent in plaintiff's-side fee-shifting litigation.

This Court has recognized that a "reasonable" attorney's fee award may provide contingent risk enhancement. In *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court upheld the attorney's fees provision of the Black Lung Benefits Act of 1972, 30 U.S.C. § 901 *et seq.*, which limits and regulates both the type of fee arrangements available and the amount of fees compensable, against the due process challenge of a prevailing claimant's attorney. The Court reasoned, *inter alia*, that the statute by its terms provides for the award of "reasonable" attorney's fees, and that the Benefits Review Board, which reviews challenged fee awards, "has construed the regulations of the Secretary of Labor governing the award of attorney's fees to permit consideration of the

attorney's *risk in going unpaid*." 494 U.S. at ___, 108 L.Ed.2d at 717 (emphasis supplied).

The plurality in *Delaware Valley II* admitted that "without the promise of risk enhancement some lawyers will decline to take cases[,]" but the plurality nonetheless remained confident that "the goal of the fee-shifting statutes" will be achieved. The plurality in fact underestimated the role of contingent risk enhancers in attracting counsel "in any market where there are competent lawyers whose time is not fully occupied by other matters." 483 U.S. at 725. In reality, virtually no contracts are made for contingent representation at noncontingent hourly rates. To restrict the use of enhancers — in the belief that plaintiffs will always be able to find representation from lawyers who do not place a higher "opportunity cost" on their time — ignores the economic reality that even those clients who are more empowered are unable to find such bargains. It is unreasonable to impose a condition on compensation that is *virtually never accepted* in voluntary agreements between lawyers and their clients.

The plurality's ultimate concern in *Delaware Valley II* was that contingent risk enhancement necessarily would compensate "plaintiff's lawyers for not prevailing against defendants in other cases." 483 U.S. at 725. But this is simply not the case. The award of enhancers does not compensate plaintiffs' counsel for cases they may have lost; rather, enhancers compensate for the risk associated with the case or cases in which they prevail. The defendant who loses a case brought under a fee-shifting statute thus is not paying for plaintiff's counsel's "losing" cases, any more than a plaintiff in a personal injury case, who must pay a contingency fee out of a damages award, is paying for his or her lawyer's losing cases. In each case the contingency risk factor is simply a component of the attorney's reasonable compensation. Thus, if *Dague* were

the only case ever to arise under the Solid Waste Disposal Act, the market would still drive respondents' attorneys to demand an appropriate risk-adjusted rate.

If the attorney's fees provisions were interpreted to limit fees awards to risk-free rates, then attorneys would work on other cases that paid the market rate on a current, risk-free hourly basis. Indeed, the dearth of attorneys willing to take on certain types of public interest litigation, as a result of the associated financial risk, is well documented. *See, e.g.*, Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. Review of Law & Social Change 535, 537-38 (1990) ("numerous attorneys have been forced to withdraw from civil rights practice for financial reasons. . . . The shortage of competent civil rights attorneys has reached crisis proportions, a fact which has been recognized by several state and federal courts," citing authorities); Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 Lab. Law. 63 (1989) ("private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places extinct"); *U.S. v. City and County of San Francisco*, 748 F.Supp. 1416, 1434 (N.D. Cal. 1990) (documenting shortage of employment discrimination counsel in San Francisco Bay Area).

Of course some attorneys might still be willing to provide what would amount to *pro bono* services by working at less than the prevailing risk-adjusted rate. Justice White has thus suggested in *Delaware Valley II* that enhancers are not needed "in those cases where plaintiffs secure help from organizations whose very purpose is to provide legal help through salaried counsel to those who themselves cannot afford to pay a lawyer." 483 U.S. at 726. Yet this argument ignores the fact that adequate

attorney's fees awards are a prerequisite to the continued existence of these organizations. The argument is also empirically refuted by the scant number of such organizations. *Delaware Valley II*, 483 U.S. at 743 (Blackmun, J. dissenting). Further, if not-for-profit organizations are not awarded fees commensurate with the amounts attainable in the private market, they will not be able to compensate as many attorneys at market rates.[3/]

Moreover, in enacting fee-shifting statutes Congress surely intended to do more than merely supplement the eleemosynary efforts of the private bar. By including fee-shifting provisions in Section 1988 and in the statutes at issue here — and by *not* including limitations or prohibitions against contingent risk enhancers — Congress expressed its intent that prevailing plaintiffs' counsel be compensated for assuming the risk of embarking on complex federal fee-shifting litigation.

This approach has been followed in a variety of cases, including antitrust cases, which set the model for statutory fee-shifting litigation. As earlier noted, Section 1988 was enacted against a backdrop of attorney's fees enhancement in the antitrust field. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2nd Cir. 1974) (antitrust: contingent risk enhancer available because "despite the most vigorous and competent of efforts, success [in litigation] is never guaranteed"); *Lindy Bros. Bldrs. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) (antitrust: lodestar may be enhanced to reflect contingent nature); *In re Coordinated Pretrial Proceedings*,

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[3/] This Court has consistently held that the calculation of attorney's fees awards should not vary depending upon whether the prevailing party was represented by a not-for-profit organization or by private counsel. *See Blum v. Stenson*, 465 U.S. at 894; *Blanchard v. Bergeron*, 489 U.S. at 95.

410 F.Supp. 680, 691 (D. Minn. 1975) (antitrust: enhancers awarded to "take the contingent nature of this litigation . . . into consideration when awarding fees"); *Blank v. Talley Indus.*, 390 F.Supp. 1, 5-6 (S.D.N.Y. 1975) (antitrust: fee award based in part on contingent risk); *In re Gypsum Cases*, 386 F.Supp. 959, 961 (N.D. Cal. 1974) (enhancer over normal hourly rates awarded in seven-year antitrust case "in which, probably more than in any other such litigation, the congressional objective of private antitrust enforcement was realized"), *aff'd*, 565 F.2d 1123 (9th Cir. 1977); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1357-58 (N.D. Ill. 1974) (enhancer over normal hourly rate awarded in landmark antitrust case); *Cherner v. Transitron Elec. Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963) (antitrust: contingent risk enhancer awarded because "[n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success") *modified on other grounds*, 326 F.2d 492 (1st Cir. 1964).

Contingent risk enhancers have also been awarded in security fraud cases. *See In re General Pub. Utils. Sec. Litig.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,566, at 97,233-34 (D. N.J. Nov. 16, 1983) (enhancer of 3.45); *Steinberg v. Hardy*, 93 F.Supp. 873, 873-74 (D. Conn. 1950) (securities: contingent risk enhancer awarded, with court noting: that "actions, even when well-founded, will seldom be brought unless counsel can be found" on a contingent basis; that "obviously a retainer on a contingency basis is distinctly less attractive" than a guaranteed hourly rate; and that "unless the courts recognize the need to fix [contingent case] compensation on a more liberal basis," lawyers will not take these cases). *See also* Class Action Reports, July-Aug., Sept.-Oct., 1990, 249 at 548 (surveying over 400 securities and antitrust class

action cases from 1974 to 1990 and finding that, on average, enhancers of 1.83 were awarded).

Contingent risk enhancers have been awarded in a host of other areas governed by fee-shifting statutes. *See Green v. Transitron Elec. Corp.*, 326 F.2d 492, 496-97 (1st Cir. 1964) (stockholder's derivative action affirming fee award in part on contingent risk); *County of Suffolk v. LILCO*, 710 F.Supp. 1477, 1481 (E.D.N.Y. 1989) (RICO case: doubling of counsels' hourly rate), *aff'd in part, rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990); *Municipal Auth. of Bloomsburg v. Pennsylvania*, 527 F.Supp. 982, 999-1000 (M.D. Pa. 1981) (enhancer, characterized by court as "extremely high" and "probably without precedent," awarded in case brought under Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq., because of "peculiar facts of this case"); *In re Cenco, Inc. Sec. Litig.*, 519 F.Supp. 322, 326-28 (N.D. Ill. 1981) (enhancer awarded to lead counsel, whom court praised for "very lean" staffing; other firms awarded lower enhancer); *Keith v. Volpe*, 86 F.R.D. 565, 575-77 (C.D. Cal. 1980) (enhancer awarded in environmental protection and civil rights action during period of high inflation); *Perlman v. Feldmann*, 160 F.Supp 310, (D. Conn. 1958) (attorney's fees award in stockholder's derivative action giving "great weight" to contingent nature of case).

Post-*Delaware Valley II* cases are to the same effect. *See Purdy v. Security Savings and Loan Association*, 727 F.Supp. 1266, 1279 (E.D. Wis. 1989) (enhancer over normal hourly rate awarded in securities fraud case); *Lattimore v. Oman Const. Co.*, 714 F.Supp. 1178,1179 (N.D. Ala. 1989), *aff'd*, 868 F.2d 437 (11th Cir. 1989); *Hidle v. Geneva County Bd. of Educ.*, 681 F.Supp. 752, 756-58 (M.D. Ala. 1988); *Rievman v. Burlington Northern Railway Co.*, 118 F.R.D. 29, 35 (S.D. N.Y. 1987) (enhancer for complexity, risk and benefit to class).

It is obvious that without the prospect of contingent risk enhancers, lawyers are more likely to behave as the market dictates they should — they will decline to take on public interest litigation, in a variety of fields, to the detriment of the public intended by Congress to be benefitted by the legislation containing the fee-shifting provisions. Judge Brieant noted this economic fact of life in In re Union Carbide, regarding securities fraud cases:

> The award of attorneys' fees in complex securities class action litigation is informed by the public policy that individuals damaged by violation of the federal securities laws should have reasonable access to counsel with the ability and experience necessary to analyze and litigate complex cases. Enforcement of the federal securities laws should be encouraged in order to carry out the statutory purpose of protecting investors and assuring compliance. . . . A large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided *and the risks undertaken*. These policies further support the award of a multiplier of counsel's lodestar fee.

724 F.Supp. at 169 (emphasis supplied). The award of contingent risk enhancers assures the enforcement of federal public interest fee-shifting legislation -- be it antitrust, securities, environmental or civil rights legislation -- by reasonably and fairly compensating counsel who prevail in actions brought under such statutes.

III. Justice O'Connor's Approach in *Delaware Valley II* is a Fair and Workable Way to Determine When Risk Enhancement is Necessary to Assure that the Prevailing Plaintiff is Awarded a Reasonable Attorney's Fee in a Fee-Shifting Case.

Counting the four dissenting Justices and Justice O'Connor, a majority of the Court in *Delaware Valley II* deemed that contingent risk enhancement is appropriate at least if the two prerequisites identified in Justice O'Connor's concurrence are met. First, the prevailing party must establish that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" 483 U.S. at 733 (citation omitted). Second, any enhancement for contingency must reflect "the difference in market treatment of contingent fee cases *as a class*, rather than . . . the 'riskiness' of any particular case." *Id*. at 731 (emphasis in original).

Justice O'Connor stated that:

> [D]istrict courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market. Haphazard and widely divergent compensation for risk can be avoided only if contingency cases are treated as a class; and contingency cases can be treated as a class only if courts strive for consistency from one fee determination to the next. Determinations involving different markets should also comport with each other. Thus, if a fee applicant attempts to prove that the relevant market provides greater compensation for contingency than the markets involved in previous cases, the applicant

> should be able to point to differences in the markets that would justify the different rates of compensation.

483 U.S. at 733.

Tying the amount of the enhancement to the market's treatment of similar contingent cases as a class eliminates the parade of horribles postulated by the *Delaware Valley II* plurality. Because the size of the enhancer would be insensitive to the riskiness of any particular case, plaintiffs' lawyers would still retain an incentive to take only those cases which have the highest probability of success. Conversely, class-based enhancement would not penalize defendants who have the strongest cases, because the high risk of plaintiffs' loss in such cases would not increase the enhancer. Consistent application of a class-based standard would also reduce the amount of *ex ante* risk born by the attorneys, who would not need to worry that a court might conclude *ex post facto* that the risk in a particular case did not justify the normal enhancer. Application of the class-based standard also ties the determination of a reasonable attorney's fee directly to Congress' purpose: to create and maintain a bar of competent counsel willing and able to represent plaintiffs in public interest litigation.

Justice O'Connor's approach is also eminently workable. It places the burden on the petitioning attorney to demonstrate that but for an enhancer the plaintiff would have had substantial difficulty retaining competent counsel. This burden can be fulfilled by looking to the voluntary bargains struck in the marketplace by attorneys and their clients. If the *Delaware Valley II* plurality's "doubt" proves valid, *i.e.*, if enhancers are not necessary to attract competent representation, then petitioning attorneys will simply fail to meet their burden under Justice O'Connor's analysis.

Since *Delaware Valley II*, a number of courts reviewing requests for fee enhancements have applied Justice O'Connor's analysis fairly and without obvious administrative difficulty. For example, *in Islamic Center of Miss. v. Starkville*, 876 F.2d 465, 472 (5th Cir. 1989), the Fifth Circuit remanded the District Court's denial of the requested contingent risk enhancer because the court had failed to make findings concerning the two prongs of Justice O'Connor's test. The Fifth Circuit stated:

> Justice O'Connor's instructions in *Delaware Valley Citizens' Council II* are explicit: the district court must consider whether a contingent enhancement would have been necessary to induce competent counsel to accept such cases at the time the case was undertaken and whether contingency cases as a class were treated differently from noncontingency cases.

Id. at 472. *See also Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988) (trial court record and findings must support award of enhancer).

The Sixth Circuit has also applied Justice O'Connor's test. *See Conklin v. Lovely*, 834 F.2d 543, 553-554 (6th Cir. 1987) (remand where District Court failed to make specific finding of fact as to amount and necessity of enhancer awarded).

The Seventh Circuit has clearly adopted Justice O'Connor's test for awarding contingent risk enhancers in cases where the evidence shows that without the enhancement plaintiffs would have faced substantial difficulties in finding counsel in the local or other relevant market, and that the relevant market compensates for contingent risk. *See Skelton v. General Motors Corp.*, 860 F.2d 250, 254 n.3 (7th Cir. 1988), *cert. denied*, 493 U.S. 810, (1989);

Soto v. Adams Elevator Equipment Co., 941 F.2d 543, 553 (7th Cir. 1991); *McGuire v. Sullivan*, 873 F.2d 974, 978-79 (7th Cir. 1989). Thus, in *King v. Board of Regents*, 748 F.Supp. 686, 691-93 (E.D. Wis. 1990), a contingent risk enhancer was awarded based on the testimony of Milwaukee attorneys and the District Court's observations regarding the difficulty for plaintiffs in his court of finding competent counsel to accept civil rights cases on a contingency fee basis. However, the District Courts in the Seventh Circuit have not awarded contingent risk enhancers when Justice O'Connor's test was not found to have been met. *See Wolf v. Planned Property Management*, 735 F.Supp. 882, 887 (N.D. Ill. 1990); *Leigh v. Eagle*, 714 F.Supp. 1465, 1475-76 (N.D. Ill. 1989).

The Eighth Circuit has applied Justice O'Connor's analysis in three cases. *See Morris v. American National Can Corp.*, 952 F.2d 200,204-07 (8th Cir. 1991); *Hendrickson v. Brendstad*, 934 F.2d 158,162 (8th Cir. 1991); *Jackson v. Rheem Manufacturing Co.*, 904 F.2d 15, 16-17 (8th Cir. 1990).

The Ninth Circuit first applied Justice O'Connor's test in *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1988), a case brought under Title VII. The Ninth Circuit sustained the District Court's award of a contingent risk enhancer. The Ninth Circuit determined, on unrebutted evidence concerning both the market and plaintiff's difficulty in securing counsel, that within the relevant market an enhancer was necessary to attract competent counsel. *Id.* at 650-51.

In *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632 (9th Cir. 1989), a case arising under the Robinson-Patman Act, 15 U.S.C. § 13(a), and analogous Washington State law, the Ninth Circuit sustained the District Courts' pre-*Delaware*

Valley II award of a contingent risk enhancer. The Court specifically found:

> In this case there is strong uncontroverted evidence on permissible factors to support the district court's award. We conclude that the district court did not 'enhance [the] fee award any more than necessary to bring the fee within the range that would attract competent counsel.' *Fadhl*, 859 F.2d at 651 (quoting *Delaware Valley II*, 483 U.S. at 733, 107 S.Ct. at 3091 (O'Connor, J. concurring)). We are also satisfied that the evidence shows why the lodestar amount would not be reasonable.

879 F.2d at 637. *See also Oviatt v. Pearce*, 92 D.A.R. 723, 728 (9th Cir. Jan. 16, 1992) (denial of enhancer appropriate where District Court had found that plaintiff had *failed* to show, in the relevant Oregon market for the class of cases involved, that "without an enhancement, plaintiffs in similar [relatively simple damages cases] will face substantial difficulties in finding counsel"); *Bernardi v. Yeutter*, 951 F.2d 971, 975 (9th Cir. 1991) (reversal of denial of enhancer and award of 2.0 enhancer, where District Court had failed to "address whether sufficient independent evidence had been presented that demonstrated that San Francisco no longer has a 'manifest need . . . for fee enhancements in civil rights cases' *Fadhl*, 859 F.2d at 651"); *Bouman v. Block*, 940 F.2d 1211, 1236 (9th Cir. 1991) (case remanded to the District Court "to consider evidence of the market conditions in Los Angeles and determine whether [plaintiff] is entitled to the 2.0 multiplier she has requested or some other multiplier in excess of the one and one third figure the district court judge used"); *Merritt v. Mackey*, 932 F.2d 1317 (9th Cir. 1991) (reversal of a District Court's enhancement of an attorney's fee that was itself based on the contingent risk inherent in bringing the action); *D'Emanuele v. Montgomery Ward & Co. Inc.*,

904 F.2d 1379, 1384, 1387 (9th Cir. 1990) (reversal of District Court's denial of enhancer in ERISA action).

The Eleventh Circuit has also relied on Justice O'Connor's analysis in approving the award of contingent risk enhancers. *Lattimore v. Oman Construction*, 868 F.2d 437, 439 (11th Cir. 1989) (per curiam). The Court concluded that "[a] fees award may be increased by 100% to compensate attorneys for the risk of accepting a case on a contingency basis and to attract competent counsel." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1248 (11th Cir. 1991).

These decisions fully validate Justice O'Connor's approach to contingent risk enhancement in federal fee-shifting litigation. The courts applying Justice O'Connor's analysis have demonstrated their ability to elicit and examine the relevant evidence and, on that basis, fairly exercise their discretion to compensate prevailing counsel for the market factor of contingent risk. This approach thus is workable in practice and consistent in principle with Congress' intent that counsel be reasonably compensated for their efforts in enforcing public interest legislation.

CONCLUSION

For the forgoing reasons, the decision below should be affirmed.

Rosen, Bien & Asaro
Sanford Jay Rosen
Counsel of Record
Andrea G. Asaro
Adela B. Karliner
Stephen M. Liacouras
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

Steven R. Shapiro
John A. Powell
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Leon Friedman
Co-counsel for the American Civil Liberties Union Foundation
148 East 78th Street
New York, NY 10021
(212) 737-0400

Richard Larson
Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512

Julius L. Chambers
Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

Terisa E. Chaw
National Employment Lawyers Association
535 Pacific Avenue
San Francisco, CA 94133
(415) 397-6335

Dated: April 10, 1992

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

Alabama Employment Lawyers Association
714 South 29th Street
Birmingham, AL 35233-2845
(205) 322-6631

The Alabama Employment Lawyers Association (AELA) is a non-profit organization consisting of approximately 25 lawyers who concentrate on the representation of individual employees in employment and labor matters. Some members of AELA are active in representing employees in federal employment discrimination matters, while others represent clients under the National Labor Relations Act or state causes of action.

Members of AELA who handle individual employment discrimination cases usually do so on a contingency fee basis. Because the judges in the federal courts of Alabama are inconsistent in the awarding of contingency enhancers, those members find it difficult to devote much time to such cases. If the Supreme Court eliminates the possibility of recovering fees similar to what AELA's members could expect in the market place for other contingent work, they will be forced to devote their time and resources to other kinds of cases and to clients with federal employment discrimination claims who can afford to pay fees on an non-contingent basis.

American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights and this nation's civil rights laws. Based on the experience of the ACLU, it is

clear that the availability of statutory attorney's fees calculated at fair market rates is critical in recruiting private attorneys to undertake civil rights litigation and thereby promote the values of the ACLU. In addition, the ACLU's own entitlement to attorney's fees is a function of market rates and, thus, any change in the way those rates are calculated for attorney's fee purposes directly affects the work of the ACLU and its affiliates throughout the country. For both of these reasons, the ACLU has a vital interest in the outcome of this case.

Joaquin G. Avila, Esq.
1774 Clear Lake Avenue
Milpitas, CA 95035-7014
(408) 263-1317

Joaquin G. Avila is a solo practitioner. His entire practice consists of representing plaintiffs in challenges to electoral systems at various governmental and quasi-governmental levels. These challenges are based primarily on the Voting Rights Act, 42 U.S.C. § 1973, and/or the United States Constitution. Mr. Avila takes all of these cases on a pure contingency basis, and depends on court-awarded attorney's fees for a substantial portion of his compensation. Without substantial enhancers to compensate for the contingency of not being paid at all, he would be forced to limit his practice and take on either hourly-rate paying clients or contingency cases with the promise of large monetary damages awards. Substantial fee enhancements are necessary to make a contingency-based practice such as Mr. Avila's economically feasible.

Cooper, Mitch, Crawford, Kuykendall & Whatley
1100 Financial Center
505 Twentieth Street North
Birmingham, AL 35203
(205) 328-9576

Cooper, Mitch, Crawford, Kuykendall & Whatley, a law firm of thirteen lawyers in Birmingham, Alabama, represents labor unions throughout the Southeast. It also has an active plaintiffs' tort practice and represents the City of Birmingham and historically black colleges in civil rights matters.

In recent years, the firm has represented a large number of individuals in employment discrimination cases. Almost all of these cases are by necessity contingency fee cases. Even with the contingency enhancers approved by the Eleventh Circuit, it is difficult to make this part of the practice financially productive. If the Supreme Court eliminates the possibility of recovering enhanced fees, then the firm will cease handling employment discrimination cases on a contingency basis; instead, the firm will devote its time and resources to other kinds of cases and to clients who can afford to pay fees on a non-contingent basis.

Disability Rights Education and Defense Fund, Inc.
2216 Sixth Street
Berkeley, CA 94710
(510) 644-2555

The Disability Rights Education and Defense Fund, Inc. (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded

from opportunities because of false and demeaning stereotypes.

DREDF's efforts to enforce federal statutes protecting the rights of people with disabilities depend in large part on its ability to work with the private bar in both individual and class action lawsuits and to refer such cases to private counsel. This ability would be seriously affected if there were no possibility of enhancers to attorney's fees awards for contingent risk.

Jay-Allen Eisen Law Corporation
1000 G Street, Suite 300
Sacramento, CA 95814
(916) 444-6171

Jay-Allen Eisen Law Corporation is a private law firm that does a significant amount of public interest work and depends in part on fees recovered in these cases as a means of financing these activities. The firm's interest in this case is to ensure that counsel performing legal services which benefit the public are adequately compensated, and will therefore be encouraged to continue performing these legal services.

Erickson, Beasley, Hewitt & Wilson
12 Geary Street, 8th Floor
San Francisco, CA 94108
(415) 781-3040

Erickson, Beasley, Hewitt & Wilson is a twelve lawyer firm with an active civil rights docket. This docket has consisted primarily of the representation of plaintiffs and plaintiff classes in complex civil rights matters in the federal courts, often against the federal government.

All of these complex civil rights cases have been contingency fee cases. Such cases are too complicated and too time consuming -- in summary, too expensive -- for

any individual plaintiff or plaintiff class to pay the firm's billings. It has always been difficult to make this area of the practice financially feasible. Without the possibility of a fee award enhancement, the firm's civil rights docket would become financially impossible, and the firm would have to drastically curtail its representation in this area of the law.

Law Office of Alan B. Exelrod
660 Market Street, Suite 300
San Francisco, CA 94104
(415) 392-2800

Alan B. Exelrod is a solo practitioner representing plaintiffs in litigation involving employment and civil rights. He has been engaged in this practice as a solo practitioner for ten years and has been involved in civil rights law since graduating from law school in 1968.

None of the plaintiffs Mr. Exelrod represents can afford to pay him his full hourly rate. He therefore assumes the risk of losing money every time he files a lawsuit. Many of these cases are hard fought over a long period of time. In calculating the economics of his practice, enhancement of fees is central to his being able to represent clients who cannot pay hourly fees. He generally does not work with civil rights organizations but litigates such cases on his own or with other private counsel.

Ferguson, Stein, Watt, Wallas, Adkins
& Gresham, P.A.
700 East Stonewall Street, Suite 730
Charlotte, NC 28202
(704) 375-8461

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., a 14-lawyer law firm, has devoted a substantial portion of its practice to representing plaintiffs in civil rights cases including school desegregation litigation,

voting rights litigation, and employment discrimination litigation on a contingency basis. Most civil rights plaintiffs do not have funds to hire attorneys on an hourly basis. Very few lawyers in North Carolina are willing to represent plaintiffs in civil rights cases when their fee will be contingent. Because of the firm's difficulty in obtaining reasonable fees, the firm has decreased its civil rights caseload over the past few years. If the Supreme Court eliminates the opportunity to obtain fee enhancements in cases that are contingent, it is likely that the firm will continue to take fewer civil rights cases. Substantial fee enhancements are necessary to make a contingency civil rights practice viable.

The Law Offices of Richard B. Fields
The Wright Carriage House
688 Jefferson Ave.
Memphis, TN 38105
(901) 529-8503

Mr. Fields and his former partners have practiced civil rights law in Memphis for over 20 years. His predecessor firm, Ratner & Sugarmon, was the first integrated law firm in Memphis and was involved in landmark civil rights litigation involving school desegregation, employment discrimination, police misconduct, and housing discrimination. The firm served as counsel in landmark civil rights cases before this Court, including *Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984), *Brandon v. Hold*, 469 U.S. 464 (1985), and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979). All of this work was undertaken on a contingency basis with the expectation of court-awarded attorney's fees. Enhanced attorney's fees awards are necessary to enable private law firms to undertake civil rights litigation.

Julian, Olson & Lasker, S.C.
330 East Wilson Street
P.O. Box 2206
Madison, WI 53701-2206
(608) 255-6400

Julian, Olson & Lasker, S.C., is a three lawyer firm that enjoys a reputation for cutting-edge constitutional and civil rights litigation on behalf of plaintiffs. Its attorneys have handled voting rights, school desegregation, employment housing discrimination and other civil rights cases across the country, many in cooperation with the NAACP Legal Defense and Educational Fund, Inc. Almost all of the firm's plaintiffs' cases are taken pursuant to contingent fee arrangements, but because attorney's fees awards have not been adequate, the firm has been forced in recent years to avoid cases in which its compensation will be wholly derived from court-awarded attorney's fees. The firm has actively sought defense work and has begun to require substantial retainers in contingent fee cases for plaintiffs. Low income clients whose claims appear meritorious but which lack substantial monetary damages components are regularly turned away, and many of these clients simply do not find lawyers to represent them at all.

Legal Services for Prisoners with Children
1535 Mission Street
San Francisco, CA 94103
(415) 255-7036

Legal Services for Prisoners with Children (LSPC) is a legal services organization focusing on the needs of prisoners, their children, and family members. Founded in 1978, LSPC provides litigation assistance to lawyers and legal advocates working with prisoners and their families on a wide range of civil legal issues. LSPC attorneys are currently co-counsel in several class actions on behalf of prisoners, parolees, and family members. LSPC joins this *amicus* brief because it is deeply concerned about the

ability of prisoners and their families to obtain legal counsel to represent them. There are few lawyers willing to represent indigent prisoners, and eliminating the potential for prevailing parties to recover enhanced attorney's fees awards would make it even harder for prisoners and their families to obtain representation.

Legal Services of Northern California
515 Twelfth Street
Sacramento, CA 95814
(916) 444-6760

Legal Services of Northern California (LSNC) is a private non-profit corporation organized and existing under the laws of the State of California for the purpose of delivering free legal assistance to individuals and groups who meet income eligibility requirements. Founded thirty-five years ago, LSNC maintains offices in five cities serving 18 counties in northern California. Last year alone, LSNC attorneys served more than 17,000 impoverished citizens with critical legal problems.

In cooperation with local bar associations, LSNC operates Voluntary Legal Services Program of Northern California, providing legal assistance in civil law matters through referrals to private attorneys. LSNC's interest in this case is to preserve its ability to refer cases to the private bar, and to attract competent counsel for such referrals.

Mexican American Legal Defense and Educational Fund
634 South Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2612

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of His-

panics living in the United States. In order to pursue this objective -- particularly with regard to vindicating the rights of Hispanics to be free from discrimination in education, employment, and full political participation -- MALDEF relies heavily on private practitioners acting as cooperating attorneys to represent Hispanics who have been the victims of discrimination. These private attorneys, who are paid neither by MALDEF nor by their impecunious clients, undertake such legal representation in reliance on market-based statutory fee awards paid only at the conclusion of cases in which their clients have prevailed. Only through fee awards which take into account the manner in which contingency risk operates in the marketplace can Hispanics have any chance of vindicating their statutory and constitutional rights in court.

NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 219-1900

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit organization organized as a legal aid society under the laws of the State of New York. It was formed to assist African Americans in securing their constitutional rights by the prosecution of lawsuits. LDF depends on members of the private bar, most of whom are single practitioners or in small firms, to associate with it as co-counsel in order to carry out its work. These attorneys, in turn, depend on the availability of attorney's fees under the various civil rights statutes to be able to participate in complex and time-consuming federal litigation. LDF has participated as counsel and as *amicus curiae* in most of the leading attorney's fees cases in this and other courts. For the above reasons, LDF has a vital interest in the outcome of this case.

National Employment Lawyers Association
535 Pacific Avenue
San Francisco, CA 94133
(415) 397-6335

The National Employment Lawyers Association (NELA) (Advocates for Employee Rights) is a non-profit corporation with over 1100 lawyer members in 49 states. Its members specialize in representing individual employees in employment rights cases. Most NELA members regularly handle discrimination cases under various civil rights statutes that provide for attorney's fees for the prevailing plaintiff. NELA and its members are constantly litigating "multiplier" fee enhancement issues in federal court and are deeply concerned about the necessity of obtaining a reasonable enhancement as an incentive to ensure that lawyers are available for victims of discrimination.

Patterson, Harkavy, Lawrence, Van Noppen & Okun
206 New Bern Place
P.O. Box 27927
Raleigh, NC 27611
(919) 755-1812

Patterson, Harkavy, Lawrence, Van Noppen & Okun is an eight lawyer firm with offices in Raleigh and Greensboro, North Carolina. Historically, a significant part of the firm's practice has involved the representation of plaintiffs in employment discrimination and constitutional tort litigation. The vast majority of these plaintiffs are unable to pay hourly fees and hence, if they are to pursue their claims, representation must be on a contingent basis.

Firms such as Patterson, Harkavy, can take such cases only if the compensation we receive for successful public interest litigation exceeds fees generated by other work where compensation is non-contingent. The firm cannot

continue to turn away clients who will pay on an hourly basis at market rates in favor of cases where the firm risks spending hundreds of hours without compensation, and then, if it prevails, can expect to receive only the same hourly fee it would have received, without risk, from other clients. Nor can public interest litigation compete with other traditional contingent cases where success normally results in fees substantially in excess of the firm's non-contingent hourly rate. Unless fees awarded by courts for successful public interest litigation reflect the market practice of enhanced compensation for contingent work, access to the courts for clients with claims of constitutional violations and discrimination will effectively be denied.

Richard M. Pearl
685 Market Street, #370
San Francisco, CA 94105
(415) 243-9912

Richard M. Pearl is a sole practitioner. He is the author of California Continuing Education of the Bar's *California Attorney's Fee Awards Practice* and its annual supplements, and is a member of the California State Bar's Attorney's Fees Task Force. In his practice, he has represented numerous profit and non-profit law firms claiming court awarded attorney's fees, and also has served as an expert witness for both fee claimants and opponents. Through that experience, he has seen first hand the monumental risk and commitment undertaken by attorneys who are willing to represent victims of civil rights and environmental law violations. The prospect of receiving a fee that will recognize that risk, as the private market does, is crucial to permitting and encouraging those attorneys to continue in this field. Without a fee that recognizes risk, the simple demands of the market will drive even the most committed attorneys out of the field, undermining Congress's purpose in providing fee-shifting statutes.

Planned Parenthood Affiliates of California
1029 K Street, Suite 24
Sacramento, CA 95814
(916) 446-5247

Planned Parenthood Affiliates of California (PPAC) is a non-profit corporation organized and existing under the laws of the State of California. PPAC's members are 16 local Planned Parenthood affiliate agencies throughout California that provide comprehensive family planning services in their various communities. PPAC advocates in the Legislature, before administrative agencies, and in the courts for provision of comprehensive family planning services on behalf of approximately 160 public and private family planning agencies, as well as individuals.

PPAC is interested in this case because PPAC depends heavily on the private bar to represent its member affiliates in cases involving family planning services. The possibility of recovering fee enhancers attracts a larger pool of skilled attorneys who are willing to undertake representation at reduced rates or on a *pro bono* basis in the expectation that if they prevail they may recover attorney's fees at market rates.

Prison Law Office
General Delivery
San Quentin, CA 94964
(415) 457-9144

The Prison Law Office (PLO) is a non-profit legal services organization dedicated to providing civil legal services to California state prisoners. This office devotes a major portion of its practice to class action civil rights litigation seeking exclusively injunctive relief. The office does not charge clients a fee and obtains approximately 75% of its funding from attorney's fees. The issue of contingency risk enhancement is particularly important to

this organization because it is crucial to its efforts to attract private firms to assist with large institutional litigation.

Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

Public Advocates, Inc. is a non-profit organization devoted to representing plaintiffs in a wide variety of public interest litigation. Public Advocates receives no payment from any of its clients, and does not receive sufficient funding from charitable contributors to finance its work. Thus, Public Advocates depends for its existence in large part on court-awarded attorney's fees. All of Public Advocates' cases are taken on a contingency basis, with the expectation that if plaintiffs prevail, they will be entitled to attorney's fees at market rates. Public Advocates often requires outside cooperating counsel to assist it in its most complex cases. Without the prospect of recovering attorney's fees, including enhancers to compensate for contingent risk, it would be difficult for this firm to attract outside counsel. Public Advocates is thus vitally interested in the outcome of this case.

Puerto Rican Legal Defense and Education Fund, Inc.
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

The Puerto Rican Legal Defense & Education Fund (PRLDEF) is a not-for-profit civil rights organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF receives approximately 10 calls every day from persons who are seeking legal assistance in pursuing civil rights claims. Many of these individuals have already unsuccessfully sought to retain attorneys in private practice to take their cases. Similarly, PRLDEF has been unable to find attorneys who

are willing to serve as cooperating co-counsel on these matters. The almost universal response from the private bar is that they cannot afford to take civil rights cases because the likelihood of success is too risky and the amount of attorney's fees too small. PRLDEF believes that in order for an award of attorney's fees to be an enticement to attorneys to handle these matters, there must be a contingency enhancement.

Rosen, Bien & Asaro
155 Montgomery Street, 8th Floor
San Francisco, CA 94104
(415) 433-6830

Rosen, Bien and Asaro, a seven lawyer firm, devotes a substantial part of its practice to complex litigation under federal fee-shifting statutes, including state-wide prisoner class actions and employment discrimination litigation. The firm's clients in these cases invariably are unable to afford legal representation except on a contingency basis. Particularly in prisoner class actions, where the relief sought is injunctive or declaratory only, and where typically no monetary damages are sought, the only basis for the firm's compensation, if plaintiffs prevail, is an award of reasonable attorney's fees pursuant to the applicable fee-shifting statutes. It is the availability of contingency risk enhancers that makes it economically feasible for a small firm like ours to take on such cases. If no such enhancers were available, the firm would be forced substantially to limit its representation of clients whose civil rights have been violated in favor of clients willing and able to pay on an hourly basis, or in favor of contingency cases with the promise of a large monetary damages award.

Supreme Court, U.S.
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(12)

No. 91-810

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CITY OF BURLINGTON,
Petitioner,

v.

ERNEST DAGUE, SR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

TALBOT S. D'ALEMBERTE *
President
AMERICAN BAR ASSOCIATION
CARTER G. PHILLIPS
JOSEPH R. GUERRA
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215
Counsel for the American Bar Association

* Counsel of Record

April 13, 1992

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QUESTION PRESENTED

Whether a court, in determining a reasonable attorney's fee award under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), or Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(d), may enhance the fee award above the lodestar amount under circumstances where attorneys in the private market would demand enhanced compensation in order to assume the risk of nonpayment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. FEE-SHIFTING STATUTES ARE DESIGNED TO PERMIT PREVAILING FEDERAL LITIGANTS TO RECOVER THE SAME LEVEL OF ATTORNEY'S FEES THAT ECONOMIC FORCES IN THE PRIVATE MARKET PROVIDE, INCLUDING ENHANCEMENTS FOR THE RISK OF NONPAYMENT WHERE APPROPRIATE	4
A. Through Fee-Shifting, Congress Sought To Replicate The Economic Incentives That Motivate Attorneys To Undertake Representation In The Private Market	4
B. Private Market Forces, And Prevailing Ethical Standards, Permit The Recovery Of Enhanced Fees Where Attorneys Assume The Risks Of Nonpayment	7
C. Congress Intended To Permit Recovery Of Fees Sufficient To Compensate For The Risks Inherent In Contingent Representation	8
II. THE OBJECTIONS TO RISK-BASED FEE ENHANCEMENTS LACK MERIT	12
A. Compensation For Assuming The Risk Of Nonpayment Is Not Necessarily Subsumed Within The "Lodestar" Calculation	13
B. In Appropriate Cases, Risk-Based Enhancements Are Necessary To Attract Competent Counsel	15

TABLE OF CONTENTS—Continued

	Page
C. Risk-Based Enhancements Do Not Improperly Compensate Persons Who Are Not "Prevailing Parties"	18
D. There Are Judicially Manageable Standards To Govern Risk-Based Fee Enhancements	20
1. Whether The Fee Applicant Would Have Faced Substantial Difficulties Attracting Competent Counsel	21
2. The Extent To Which The Relevant Market Compensates For The Risk Of Nonpayment	24
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

	Page
Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975)	9
Angoff v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959)	10
Arenson v. *Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974)	10
Blanchard v. *Bergeron*, 489 U.S. 87 (1989)	14
Blum v. *Stenson*, 465 U.S. 886 (1984)	*passim*
Carey v. *Piphus*, 435 U.S. 247 (1978)	16
Cherner v. *Transitron Elec. Corp.*, 221 F. Supp. 55 (D. Mass. 1963), *modified and aff'd sub nom. Green* v. *Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964)	11
City of Detroit v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)	10
City of Riverside v. *Rivera*, 477 U.S. 561 (1986)	17
Evans v. *Jeff D.*, 475 U.S. 717 (1986)	19
Green v. *Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964)	10
Hensley v. *Eckerhart*, 461 U.S. 424 (1983)	*passim*
Herman & MacLean v. *Huddleston*, 459 U.S. 375 (1983)	12
Independent Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989)	5
Johnson v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)	9
Jones v. *Central Soya Co.*, 748 F.2d 586 (11th Cir. 1984)	21
King v. *Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. filed*, Feb. 21, 1992	23, 25
Lewis v. *Coughlin*, 801 F.2d 570 (2d Cir. 1986)	8
Lindy Bros. Builders, Inc. v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)	10
Missouri v. *Jenkins*, 491 U.S. 274 (1989)	6, 18
National Treasury Employees Union v. *Nixon*, 521 F.2d 317 (D.C. Cir. 1975)	10
Nix v. *Whiteside*, 475 U.S. 157 (1986)	7
Northcross v. *Board of Educ.*, 611 F.2d 624 (6th Cir.), *cert. denied*, 447 U.S. 911 (1979)	14

TABLE OF AUTHORITIES—Continued

	Page
Ohio-Sealy Mattress Mfg. Co. v. *Sealy Inc.*, 776 F.2d 646 (7th Cir. 1985)	8, 21
In re Osofsky, 50 F.2d 925 (S.D.N.Y. 1931)	10
Pacific Coast Agricultural Export Ass'n v. *Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976)	10
Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986)	5, 14, 17
Pennsylvania v. *Delaware Valley Citizens' Council For Clean Air*, 483 U.S. 711 (1987)	2, 20
Pete v. *United Mine Workers Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975)	10
Stanford Daily v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974)	9, 21
Texas State Teachers Ass'n v. *Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989)	18
United States Dep't of Labor v. *Triplett*, 494 U.S. 715 (1990)	26
Venegas v. *Mitchell*, 495 U.S. 82 (1990)	19, 22
Yates v. *Mobile County Personnel Bd.*, 719 F.2d 1530 (11th Cir. 1983)	8, 18

STATUTES

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at scattered sections of 42 U.S.C.)	9
2000a-3(b)	9
2000c-5(k)	9
Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-599, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988)	5
Comprehensive Older Americans Act Amendments of 1978, Pub. L. No. 95-478, 92 Stat. 1513 (1978) (codified at scattered sections of 42 U.S.C.)	11
6104(e)(1)	11

TABLE OF AUTHORITIES—Continued

	Page
Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at scattered sections of 5, 15, 28 U.S.C.)	11
28 U.S.C. § 2412(d)(2)(A)	11
Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at scattered sections of 29 U.S.C.)	16
§ 216(b)	16
Federal Water Pollution Control Act (Clean Water Act), ch. 758, 86 Stat. 888 (1948) (codified as amended at 33 U.S.C. §§ 1251 *et seq.*)	4
1365(d)	4
National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301-4305)	11
4304(a)(1)	11
Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified at 5 U.S.C. § 552a)	16
Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 997 (1965) (codified as amended at scattered sections of 42 U.S.C.)	4
6972(e)	4
Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b)	[illegible]
Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, 91 Stat. 445 (1977) (codified at scattered sections of 30 U.S.C.)	11
1270(d)	11

LEGISLATIVE MATERIALS

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976)	5, 17
S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908	*passim*

OTHER AUTHORITIES

ABA Model Code of Professional Responsibility (1980)	7
ABA Model Rules of Professional Conduct (1991)	7

TABLE OF AUTHORITIES—Continued

	Page
ABA, Summary of Action of the House of Delegates (Midyear Meeting, Feb. 13-15, 1978)	2
ABA, Summary of Action of the House of Delegates (Annual Meeting, Aug. 5-6, 1980)	2
33 ABA, *Reports of the American Bar Association* (1908)	7
Canons of Professional Ethics, *reprinted in* ABA, *Opinions of the Committee with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated* (1967)	7
1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* (Oct. 1991)	16
2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* (1985)	11
F. B. MacKinnon, *Contingent Fees for Legal Services* (1964)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-810

CITY OF BURLINGTON,
Petitioner,
v.
ERNEST DAGUE, SR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the nation's leading professional organization of lawyers, numbering more than 365,000 members throughout the United States. As the national organization of the bar, the ABA has long promulgated standards of professional responsibility, including standards governing the fees that attorneys may permissibly charge for their services. The ABA's membership includes lawyers who represent plaintiffs on a fee-shifting basis, lawyers who represent plaintiffs on a contingency basis, and lawyers who represent defendants. Although the perspectives of these members differ, it is generally recognized that, where a

lawyer's compensation depends upon a client's success, the lawyer may permissibly charge a larger fee than where his or her compensation is not contingent on success. In fee-shifting cases, this means that a reasonable fee may include a contingency premium.

Although the ABA takes no position on the propriety of the specific enhancement awarded in this case, it has encouraged the development of federal fee-shifting statutes,[1] and believes its ethical standards should help guide judicial determinations concerning the reasonableness of fees awarded under those statutes. For this reason, the ABA participated as an *amicus curiae* in *Pennsylvania* v. *Delaware Valley Citizens' Council For Clean Air*, 483 U.S. 711 (1987) (*"Delaware Valley II"*), the last case in which this Court addressed whether statutory fee awards may be enhanced to reflect the risk of nonpayment.[2]

SUMMARY OF ARGUMENT

Through fee-shifting provisions, Congress has sought to ensure "effective access to the judicial process" for selected federal claims. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citation

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[1] *See, e.g.*, ABA, Summary of Action of the House of Delegates 19 (Annual Meeting, Aug. 5-6, 1980) (recommending legislation establishing uniform principles for regulation of attorney's fees in proceedings conducted before federal administrative agencies); ABA, Summary of Action of the House of Delegates 7 (Midyear Meeting, Feb. 13-15, 1978) (recommending legislation providing for recovery of reasonable attorney's fees in certain cases where private parties substantially prevail against the federal government); *see also* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5909 (noting ABA's participation in hearings on Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988).

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the ABA's filing as *amicus curiae* in support of respondents. Letters of consent have been filed with the Clerk of the Court.

omitted). Fee-shifting provisions serve this goal by replicating for federal claims the economic incentives that motivate attorneys to undertake representation in the private market. By assuring attorneys that, if their clients prevail, they will receive fees reflecting the prevailing market rates for the hours they have worked, fee-shifting eliminates the most immediate disincentive to representing federal claimants.

Nevertheless, compensation under such provisions remains contingent upon success, a fact that, in the private market, has long permitted attorneys to demand payment of a premium over standard billing rates to compensate for the economic risks of nonpayment. Thus, to replicate the compensation available in the private market, an award of "reasonable" attorney's fees must provide for enhancement in those circumstances where attorneys in the private market would charge a premium. Such enhancements further the statutory objective of attracting competent counsel to federal claims, and are fully consistent with Congress' express endorsement of, and longstanding acquiescence in, judicial awards of risk-based enhancements.

The objections to risk-based enhancements are not well founded. Compensation for the risk of nonpayment is neither subsumed within nor inconsistent with the lodestar calculus. Where a fee applicant can demonstrate that one of the determinations that governs attorney compensation in the private market—an unmitigatable risk of nonpayment—is not reflected in the lodestar, an upward adjustment is appropriate. Nor do such adjustments violate the statutory requirement that fees be awarded only to "prevailing" parties. Only a successful claimant can ever recover an award of enhanced fees; to the extent such awards are passed on to attorneys, they constitute compensation for assuming the economic risks of nonpayment, not a subsidy for losses the attorneys may or may not have suffered in other federal litigation.

The supposed difficulties of determining fee enhancements under the two-part test announced in Justice O'Connor's concurrence in *Delaware Valley II* do not justify a categorical refusal to consider whether market forces permit compensation for the risk of nonpayment. There are a number of objectively-verifiable factors courts can and do look to in order to determine whether the risks of nonpayment in an individual case could have been mitigated, and hence whether the fee applicant would have faced substantial difficulties retaining counsel. Nor are there insurmountable conceptual difficulties in determining whether a given relevant market compensates for the risk of nonpayment. To the contrary, such determinations are no more inherently difficult than those courts make in establishing the lodestar.

ARGUMENT

I. FEE-SHIFTING STATUTES ARE DESIGNED TO PERMIT PREVAILING FEDERAL LITIGANTS TO RECOVER THE SAME LEVEL OF ATTORNEY'S FEES THAT ECONOMIC FORCES IN THE PRIVATE MARKET PROVIDE, INCLUDING ENHANCEMENTS FOR THE RISK OF NONPAYMENT WHERE APPROPRIATE.

A. Through Fee-Shifting, Congress Sought to Replicate the Economic Incentives That Motivate Attorneys to Undertake Representation in the Private Market.

In a wide variety of statutes, including the Solid Waste Disposal Act and the Clean Water Act at issue in this litigation, Congress has authorized courts to award "reasonable" attorney's fees to a "prevailing" or "substantially prevailing" party.[3] Fee-shifting provisions rest on

[3] *See* Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6972(e) (court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party"); Federal Water Pollution Control Act (Clean Water Act) § 505(d), 33 U.S.C. § 1365(d) (same). Examples of other statutes employing comparable language are set forth in the Brief for the United States as *Amicus Curiae* ("U.S. Br.") at 5 n.3.

the congressional recognition that prospective litigants seeking to vindicate interests created or protected by federal statutes often are unable to retain attorneys to represent them, and that the underlying federal interests these litigants seek to vindicate often do not give rise to damage recoveries that might induce attorneys to undertake contingent representation. Explaining the need for the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988,[4] Congress noted that, "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).[5] Moreover, "while damages are theoretically available . . . immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage recovery." *Id.* at 9.[6]

Seeking to provide the economic incentives necessary to attract competent counsel to these federal claims, Con-

[4] This Court has recognized that the standards for determining "reasonable" fees under Section 1988 apply equally to other federal fee-shifting provisions (*Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983)), and has looked to this statute and its legislative history to guide its interpretation of other fee-shifting enactments. *See, e.g., Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989) (fee-shifting provisions of Title VII); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-60 (1986) (*"Delaware Valley I"*) (fee-shifting provisions of the Clean Water Act).

[5] *See also* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer").

[6] In addition, as the United States notes, "many statutes with fee-shifting provisions—including [those at issue in this litigation]—do not allow plaintiffs to recover monetary damage awards from defendants." U.S. Br. at 20 n.19.

gress directed that attorney's fees awarded under fee-shifting provisions must be based on the standards governing attorney compensation in the private market. Thus, Congress explained that the reasonable fee awarded to a prevailing plaintiff should be computed in the same manner as fees for "attorneys compensated by a fee-paying client." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Statutory fees, moreover, should "not be reduced because the rights involved may be nonpecuniary in nature." *Id.* Computing fees in this manner, Congress observed, will result in awards that "are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Id.* Accordingly, this Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable'" (*Missouri* v. *Jenkins*, 491 U.S. 274, 285 (1989)), and has thus concluded that statutory fee awards must "be calculated according to the prevailing market rates in the relevant community" (*Blum* v. *Stenson*, 465 U.S. 886, 895 (1984)) in order to "yield the same level of compensation that would be available from the market." *Jenkins*, 491 U.S. at 286.

By assuring attorneys that they will be paid in accordance with the prevailing market rates if their clients prevail, statutory fee awards eliminate the most immediate disincentive to representation of federal litigants. Such awards, however, remain contingent upon success, and thus expose counsel to a number of significant risks. These include not only the possibility of loss, and thus of no recovery at all, but also the possibility that the case will require additional personnel whose salaries must be advanced pending an ultimate award, or that the case will crowd out other work that would be compensated fully. To achieve their goal of replicating the economic incentives that impel attorneys in the private market to undertake representation, statutory fee awards must compensate for these risks in a manner approximating the operation of the private market.

B. Private Market Forces, And Prevailing Ethical Standards, Permit The Recovery Of Enhanced Fees Where Attorneys Assume The Risks Of Nonpayment.

In the private market, attorneys often demand a premium, or enhancement, over standard billing rates to compensate for the risks they assume in undertaking contingent representation. Indeed, throughout this century, the legal profession has recognized that when attorneys accept representation on the understanding that they will be compensated only if their client prevails, they may reasonably charge a premium if their clients in fact do prevail. As early as 1908, the ABA Canons of Professional Ethics recognized that "[i]n determining the amount of the fee, it is proper to consider . . . the contingency of the compensation."[7] Both the ABA Model Code of Professional Responsibility, which was promulgated in 1969 and subsequently adopted in virtually every American jurisdiction (see *Nix* v. *Whiteside*, 475 U.S. 157, 167 n.4 (1986)), and the more recently promulgated ABA Model Rules of Professional Conduct, demonstrate the continuing consensus among the nation's lawyers that one of the "[f]actors to be considered" in determining a reasonable fee is "[w]hether the fee is fixed or contingent."[8]

The long-standing ethical precept reflected in these various codifications is founded on the unremarkable economic principle that, all other things being equal, certain payment is preferable to payment that is contingent on success. Like other economic actors, attorneys expect to be compensated for assuming the risk of nonpayment; if

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[7] Canons of Professional Ethics, Canon 12(5), *reprinted in* ABA, *Opinions of the Committee with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated* 48-49 (1967). The ABA adopted Canon 12 in 1908 as part of its first comprehensive code of professional ethics for attorneys. 33 ABA, *Reports of the American Bar Association* 578 (1908).

[8] *See* ABA Model Code of Professional Responsibility DR 2-106 (B) (1980); ABA Model Rules of Professional Conduct Rule 1.5 (a)(8) (1991).

they are not, few, if any, will agree to accept employment on a contingent basis.[9]

Thus, to replicate the economic incentives that operate in the private market—which are fully consistent with and supported by ethical standards—statutory fee awards must allow enhancement where attorneys assume risks that, in the private market, would justify recovery of a premium. It is difficult to imagine that Congress, in enacting a "reasonable attorney's fees" requirement, was not aware of the prevailing practice of charging a premium for the risk of nonpayment. See *infra* pp. 9-12. But in any event, to the extent statutory fee awards do not provide full compensation for such risks, attorneys will lack sufficient incentives to take such cases.[10] This disincentive will defeat the basic goal of fee-shifting legislation—ensuring " 'effective access to the judicial process' " for selected federal claims, *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976))—and ultimately will impair the substantive federal interests furthered by the procedural device of fee-shifting.

C. Congress Intended To Permit Recovery Of Fees Sufficient To Compensate For The Risks Inherent In Contingent Representation.

Not only are fee enhancements for risk of nonpayment fully consistent with the purposes of fee-shifting statutes, but it is clear that Congress intended to permit the recovery of such enhancements. As this Court has observed, "Congress was legislating in light of experience when it enacted the 1976 fee statute." *Blum*, 465 U.S. at 894 n.10. Prior to the enactment of § 1988, courts looked to ABA guidelines in determining the amount of reasonable statutory fee awards[11] and, consistent with DR 2-106 (B)(8) and Model Rule 1.5(a)(8), held that contingency of payment could justify an enhanced award.

The most notable example is *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in which the Fifth Circuit adopted the factors set forth in DR 2-106 as guidelines for determining the size of attorney's fee awards under Title VII of the Civil Rights Act of 1964, including, specifically, "[w]hether the fee is fixed or contingent." *Id.* at 718 (emphasis omitted).[12] The Senate Report accompanying § 1988 expressly identifies the *Johnson* factors as "appropriate standards" for determining "reasonable" attorney's fees. Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. In addition, as an example of a decision that "correctly applied" these factors, Congress cited (see *id.*) *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), a case in which the district court concluded that it "must increase the [lodestar amount] . . . to reflect the

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[9] F. B. MacKinnon, *Contingent Fees for Legal Services* 3-6 (1964) (enhancement for risk of nonpayment ensures that contingent employment is an economically attractive and feasible enterprise).

[10] *See Lewis* v. *Coughlin*, 801 F.2d 570 (2d Cir. 1986); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F.2d 646, 662 (7th Cir. 1985) (risk adjustment "provides an inducement for lawyers to accept meritorious cases that might otherwise go unheard"); *Yates* v. *Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (if compensation is limited to the hourly rate charged in noncontingent employment, competent attorneys "could not afford to accept contingent employment").

[11] Such fee awards were expressly authorized by statutes, such as Titles II and VII of the Civil Rights Act of 1964 (see 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k)), the provisions upon which § 1988 was patterned. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983). In addition, courts had awarded fees under the Reconstruction-era civil rights laws pursuant to their traditional equity powers prior to this Court's decision in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

[12] The twelve factors identified in *Johnson* simply restated the eight factors in DR 2-106 and Model Rule 1.5, with one additional factor: the "undesirability" of the case. Compare *Johnson* with DR 2-106(B).

fact that the attorney's compensation, at least in part, was contingent in nature." *Id.* at 686.[13]

Congressional acceptance of risk adjustment in statutory fee awards is further underscored by its admonition that fees awarded under § 1988 should be equivalent to those awarded "in other types of equally complex Federal litigation, such as antitrust cases." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Prior to enactment of § 1988, federal courts awarding attorney's fees in antitrust cases often permitted an upward adjustment in the fee to compensate for the contingency of payment.[14] Similarly, in other types of "complex Federal litigation" where fee-shifting was then permitted, courts often took account of the contingency of payment in determining a reasonable fee.[15]

[13] Petitioner and its *amici* take great pains to parse these cases in the hopes of distinguishing them away, yet none can deny that, in endorsing *Stanford Daily*, Congress expressly approved an enhancement of fees based in part on the risk of nonpayment. *See* U.S. Br. at 25 ("The citation to *Stanford Daily* . . . does not *require* that the 'contingency' factor is to be treated any differently" than other *Johnson* factors subsumed within the "lodestar" calculation) (emphasis added). Moreover, neither petitioner nor its *amici* have identified anything in the legislative history that affirmatively supports their contention that Congress never intended to permit risk-based enhancements.

[14] *See, e.g., Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Arenson* v. *Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974).

[15] *National Treasury Employees Union* v. *Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (labor law class action); *Pete* v. *United Mine Workers Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975) (*en banc*) (similar); *Green* v. *Transitron Elec. Corp.*, 326 F.2d 492, 496 (1st Cir. 1964) (securities class action); *Angoff* v. *Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (similar); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (bankruptcy).

In one such case, decided under the federal securities laws nearly 30 years ago, Judge Wyzanski noted that such enhancement is permissible because:

> [n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.

Cherner v. *Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963), *modified and aff'd sub nom. Green* v. *Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964).

Finally, in the years since the enactment of § 1988, risk-based enhancement of the "lodestar" in fee awards has been widely available. See generally 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[2] (1985) (collecting cases). During this period Congress has enacted a number of fee-shifting statutes, yet in none of them did it prohibit risk-based enhancement.[16] Had Congress wished to eliminate the possibility of such enhancements, it plainly could have and presumably would have done so,[17] but it did not. This acquiescence in

[16] *See, e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. § 4304(a)(1); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1).

[17] *Cf.* Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(2)(A) (in suits against the United States, "attorney fees shall not be awarded in excess of $75 per hour"). Pointing to the EAJA as evidence that "the public fisc is one of the interests Congress normally considers in enacting fee-shifting statutes" Brief of *Amici Curiae*, The District of Columbia and Several of the States ("State's Br.") at 10, the State *amici* argue that this interest counsels against recognition of risk enhancements. Even assuming that fee-shifting provisions applied only to governmental defendants—and plainly they do not—the State *amici* draw precisely the wrong conclusion from this evidence: because Congress knows how to protect the public fisc from fee awards and yet did not do so in the fee-

judicial recognition of risk-based fee enhancements is strong evidence of a congressional intent to permit such awards. Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-86 (1983) (Congress can be assumed to have endorsed—by failing to overturn—judicial interpretation that is "well-established").

In short, because fee-shifting statutes are designed to eliminate the disincentives to contingent federal representation and to place such representation on the same economic footing as representation in the private market, the reasonableness of statutory fee awards must be decided by the same determinants that govern attorney compensation in the private market. Accordingly, statutory fee awards must compensate for the risks of nonpayment in circumstances comparable to those which, in the private market for legal services, justify enhanced fees. Fee enhancements for such risks help to ensure that competent counsel will be attracted to federal claims, and thereby further the central objective of fee-shifting statutes. The various reasons advanced against such enhancements by petitioner and its *amici* do not justify the crabbed interpretation of the statute that they propose.

II. THE OBJECTIONS TO RISK-BASED FEE ENHANCEMENTS LACK MERIT.

Disregarding Congress' desire to permit fee awards for successful contingent federal claims to reflect the same economic incentives that establish attorney compensation in the private market, petitioner and its *amici* offer a number of policy reasons in support of their contention that risk-based enhancement should never be permitted. Thus, they argue that the "lodestar" methodology fully compensates successful litigants and that any

shifting provisions at issue here, it must have intended to allow courts to establish fee awards under these provisions in a manner that approximates the compensation that normal market forces would provide.

enhancement necessarily constitutes an impermissible windfall; that risk-based fee enhancements are not necessary to attract competent counsel to federal claims; that enhancements impermissibly subsidize unsuccessful federal litigation; and that there are no manageable judicial standards to govern enhancement awards. As shown below, none of these objections has merit.

A. Compensation For Assuming The Risk Of Nonpayment Is Not Necessarily Subsumed Within The "Lodestar" Calculation.

Petitioner contends that the "lodestar" methodology of multiplying the reasonable number of hours by a reasonable hourly rate "necessarily reflects contingency considerations." Pet. Br. at 18. This is so, petitioner argues, because the selection of a reasonable hourly rate is made in light of the known fact that compensation under fee-shifting statutes is always contingent upon success. *Id.* at 17. Thus, petitioner concludes, "[a]ny enhancement of the lodestar based on contingent risk of loss . . . is inherently duplicative." *Id.* at 18.

This argument incorrectly assumes that the reasonable hourly rate used to calculate the lodestar is one that an attorney agrees to accept prior to undertaking representation of a federal litigant. Congress made clear, however, that attorneys representing federal litigants should be compensated in roughly the same manner "as . . . attorneys compensated by a fee-paying client." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. The hourly rate used in the lodestar calculation, therefore, is not one to which the prevailing party and his or her attorney agreed, but the rate that prevails in the relevant market for attorneys of comparable skill and experience. *Blum*, 465 U.S. at 895 & n.11.[18]

[18] Indeed, this Court has held that the particular contractual arrangements between prevailing parties and their counsel do not establish what a reasonable fee should be under the statute. *Blan-*

Although a prevailing party could recover fees reflecting compensation for the risk of nonpayment by proving the prevailing hourly rate charged by the market when payment is contingent on success,[19] typically the only ascertainable prevailing market rates—and thus those used in calculating the lodestar—are those charged to clients who pay for services regardless of outcome. Contrary to petitioner's assumption, these rates do not reflect contingency factors; rather, they reflect the level of compensation attorneys in the market expect to receive when payment is certain. Thus, adjusting a lodestar based on these rates does not entail any duplication.

Nor are risk-based enhancements inconsistent with the presumption that the lodestar establishes a reasonable fee. This presumption of reasonableness attaches to the lodestar because the latter typically reflects all the determinants that govern attorney compensation in the private market.[20] The presumption is not conclusive, however, and properly yields when a successful litigant is able to demonstrate that prevailing market rates do not include compensation for the risk of nonpayment and that the prevailing practice in the relevant market is to charge a premium over standard billing rates to reflect the economic yield necessary to induce attorneys to accept such risks.[21]

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chard v. *Bergeron*, 489 U.S. 87, 94-96 (1989). As the ABA demonstrates below, the particular fee arrangement may be relevant in determining whether the prevailing party would have faced difficulties obtaining counsel, and thus may be relevant to determining whether a risk-based enhancement is appropriate.

[19] *See, e.g., Northcross* v. *Board of Educ.*, 611 F.2d 624, 638-39 (6th Cir.), *cert. denied*, 447 U.S. 911 (1979).

[20] *See Blum*, 465 U.S. at 898-900 ("novelty and complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" are presumably fully reflected in the lodestar); *Delaware Valley I*, 478 U.S. at 566 ("considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate").

Indeed, to treat the lodestar as a complete restriction upon contingent attorney's fees places plaintiffs in a hopelessly disadvantageous position vis-a-vis defendants. In many cases, defendants have a battery of attorneys working at standard hourly rates who are compensated monthly for the reasonable hours they expend. By contrast, plaintiffs' counsel, who often are solo practitioners or work in small offices, are required to assume the entire risk of success plus the financial burden of delay in being compensated, yet at the end of the process will be compensated at a rate that is never greater than that received by the defense counsel who assumed no risk. Congress' purpose to create a more level playing field for plaintiffs pursuing important federal statutory objectives can only be served effectively by providing the prospect of a fee enhancement as an incentive for plaintiffs' lawyers to undertake representation at the outset.

B. In Appropriate Cases, Risk-Based Enhancements Are Necessary To Attract Competent Counsel.

Petitioner's supporting *amici* assert that contingency enhancements are unnecessary to ensure prosecution of meritorious claims under federal fee-shifting provisions. The United States, for example, points out that some plaintiffs will be affluent enough to hire lawyers on an

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[21] The argument that recognition of risk-based enhancements is a policy judgment that Congress alone can make (States Br. at 24-26) is entirely misplaced. Congress has already made the policy judgment that attorneys representing successful federal litigants should be compensated in the same manner as attorneys who work for fee-paying clients. Whether a given fee award should include an enhancement for risk, therefore, turns not on any of the policy questions the State *amici* proffer (see *id.*), but on factual determinations concerning whether, and to what extent, the relevant legal market compensates for the risk of nonpayment. *Cf.* U.S. Br. at 13 n.13 (establishing relevant market rate is a "basic factual determination[]").

hourly basis and that some plaintiffs will have cases in which the likely damage recovery is large enough to attract counsel on an ordinary contingent-fee basis without regard to fee-shifting. See U.S. Br. at 16-17. Thus, the United States concludes, contingency enhancements are arguably necessary only in that "limited class of cases" where plaintiffs cannot afford to hire lawyers on a fee-paying basis and where they seek to bring cases in which liability is neither certain nor likely to result in a sizable damage award. *Id.* at 17.

As an initial matter, the United States offers no support for its assertion that the class of cases for which enhancement might be appropriate is "limited." Indeed, the United States itself acknowledges that "many statutes with fee-shifting provisions—including the SWDA and the Clean Water Act—do not *allow* plaintiffs to recover monetary damage awards from defendants." *Id.* at 20 n.19 (emphasis added).[22] In addition, as the United States concedes, there are many actions in which any damages recovered are likely to be relatively small.[23] Thus, far from being *de minimis*, the number of cases in the class the United States identifies is substantial.

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[22] In fact, within the environmental protection area, "there are only two . . . fee shifting measures that are appended to causes of action which allow the recovery of damages." 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 5.03 [6] (Oct. 1991).

[23] For example, "many Title VII cases produce little or no monetary recovery, and therefore do not provide a basis for percentage-based contingency fees." U.S. Br. at 20 n.19. Other examples include 5 U.S.C. § 552a (permitting award of attorney's fees in action brought under the Privacy Act); 5 U.S.C. § 552b (same; Sunshine Act); and 29 U.S.C. § 216(b) (permitting award of attorney's fees in suit brought by employee under Fair Labor Standards Act to recover unpaid minimum wages or unpaid overtime compensation). This Court has recognized an entire class of cases alleging the deprivation of constitutional rights the prosecution of which is "importan[t] to organized society," but for which successful plaintiffs may be awarded only nominal damages. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

More important, the argument misses the point of statutory fee-shifting provisions. Congress enacted fee-shifting provisions precisely *in order* to make counsel available to prosecute meritorious federal cases for which the prospect of a large damage recovery was insufficient to attract counsel on the open market. In enacting § 1988, for example, Congress was very much aware that "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality opinion). Thus, "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so." *Id.*[24]

Nor does it matter that some plaintiffs will be affluent enough to hire lawyers without resorting to contingency arrangements. It could not be more plain that Congress' intent in enacting the fee-shifting provisions was not to protect those who already had access to the courthouse, but to protect those plaintiffs who did not. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (Congress enacted § 1988 to provide " 'effective access to the judicial process' " to persons who otherwise would not have their day in court) (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976)); see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"). Similarly, the existence of both "not-for-profit legal services organizations" and for-profit lawyers who

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[24] These same concerns animate other federal fee-shifting provisions as well. *Cf. Delaware Valley I*, 478 U.S. at 559 (the purposes underlying § 1988 and fee-shifting provision found in Clean Air Act "are nearly identical").

are underemployed do not demonstrate that risk-based enhancements are unnecessary. See State Br. at 16-17. Congress long ago rejected the idea that the less-affluent should be relegated under fee-shifting statutes to lawyers who might be willing to take their case on a *pro bono* basis or whose skills are such that they remain underemployed and available for cut-rate work. See *Blum*, 465 U.S. at 894-95 (fee awards must mirror "prevailing market rates"); *Missouri* v. *Jenkins*, 491 U.S. 274, 283, 286 (1989) (same); *Yates* v. *Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (enforcement of civil rights acts should not be "entrusted largely to less capable and less successful lawyers who lack sufficient employment").

In short, it is no answer to point out that contingency enhancements are needed only in cases where the market itself will not attract competent counsel. It is precisely those cases that motivated Congress to enact fee-shifting statutes.

C. Risk-Based Enhancements Do Not Improperly Compensate Persons Who Are Not "Prevailing Parties."

Petitioner's supporting *amici* contend that risk-based enhancements violate the requirement, common to all fee-shifting statutes, that fees be awarded only to a "prevailing" or "substantially prevailing" party. This argument, however, conflates and thereby confuses two separate statutory requirements: 1) a showing that the fee applicant "prevailed" and 2) a showing that the fees he or she seeks are "reasonable."

The "prevailing party" requirement is merely a statutory "threshold to a fee award of some kind." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Once applicants cross this threshold, the fees they seek must be established in accordance with the statutory requirement of reasonableness, which depends analytically on the economic determinants

that govern attorney compensation in the relevant legal market. Whatever the amount of the fees established under this reasonableness standard, however, "it is the [prevailing] party, rather than the lawyer, who is . . . eligible" to receive them. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990); see also *Evans* v. *Jeff D.*, 475 U.S. 717, 731-32 (1986) (Congress did not "bestow[] fee awards upon attorneys"). Thus, only prevailing parties may recover fee awards, whether those awards are enhanced for risk of nonpayment or not. No non-prevailing party may recover them, and nothing in *amici*'s analysis demonstrates that this basic requirement of the statute would be violated.

Nevertheless, the *amici* supporting petitioner claim that risk-based enhancements violate the "prevailing party" requirement because such enhancements "*[i]n effect* . . . compensate attorneys for their unsuccessful efforts." U.S. Br. at 14 (emphasis added). This "effective cross-subsidy" argument is misconceived. *First*, because, as just noted, fees are awarded to prevailing parties and not their attorneys, the cross-subsidy argument depends on the assumption that fee awards are passed on to attorneys who in turn devote themselves to representing other claimants under fee-shifting statutes. Prevailing parties, however, may often be represented by lawyers who otherwise represent fee-paying clients. In these not uncommon cases, there is no basis whatever to the claim that enhancements subsidize losing efforts brought on behalf of other federal litigants.

Second, even where enhanced fees are passed on to attorneys who represent other federal claimants, such fees compensate attorneys for assuming the *risk* of losing, not for actual losses. Enhancements reflect the additional yield that attorneys, like all other economic actors, require in order to devote profit-making resources to endeavors that may generate no return at all. Thus, a risk-based enhancement no more subsidizes an attorney's losing

efforts in other fee-shifting litigation than the premium that attorneys charge in non-federal contingent cases subsidizes the rates they charge fee-for-services clients. Because enhancements represent the direct economic reward for assuming the risk of nonpayment in the particular case, they remain "reasonable" within the meaning of the statute.

Third, even if the "cross-subsidy" characterization were otherwise accurate, this Court has already rejected the contention that, in calculating attorney's fees, courts may disregard prevailing market practices in order to prevent subsidization of other federal litigation. In *Blum* v. *Stenson*, the United States argued as *amicus curiae* that, because prevailing market rates incorporate operating expenses that may exceed the expenses of nonprofit legal services organizations, and because such rates include an element of profit unnecessary to attract nonprofit counsel, "fee awards based on market rates 'confer an unjustified . . . subsidy upon legal services organizations.'" 465 U.S. at 893 (quoting Brief for United States as *Amicus Curiae* at 6). This Court held unanimously that prevailing market practices nevertheless govern the determination of reasonable fees, and that "[t]he policy arguments advanced in favor of a cost-based standard [that would eliminate the risk of subsidization] should be addressed to Congress." *Id.* at 895-96.

D. There Are Judicially Manageable Standards To Govern Risk-Based Fee Enhancements.

The *Delaware Valley II* concurrence set forth a two-step inquiry to guide judicial determinations as to the availability and amount of risk-based fee enhancements. First, the fee applicant must demonstrate how the relevant market compensates for the risk of nonpayment. Second, the applicant must demonstrate that he or she would have faced substantial difficulties attracting counsel without the prospect of a fee enhancement. *Delaware Valley II*, 483 U.S. at 733.

Petitioner and its supporting *amici* argue that, because awarding risk-based enhancements under this two-step analysis entails asserted practical difficulties, such awards should never be permitted. The difficulties postulated, however, are neither so great nor so unique that they justify a complete refusal to consider whether prevailing market forces permit compensation for the risk of nonpayment. The *Delaware Valley II* concurrence's two-part test, slightly modified in the respects noted below, provides an entirely workable framework within which courts may properly adjust the lodestar to reflect the risk of nonpayment. In any event, to the extent that determinations of the "reasonableness" of fees necessary to ensure competent counsel for federal claimants entail difficulties, these concerns are unquestionably more properly addressed by Congress.

1. *Whether The Fee Applicant Would Have Faced Substantial Difficulties Attracting Competent Counsel.*

As an initial matter, of course, no risk-based enhancement can be awarded unless the fee applicant demonstrates that his or her attorney undertook representation on a contingent basis. Clearly, where the applicant pays for legal services regardless of outcome, the attorney has assumed no risk of nonpayment and the applicant can claim no entitlement to enhancement.[25] Beyond this obvious situation, there are a number of other, objectively-verifiable factors that courts can consider in determining whether the applicant would have faced substantial difficulties obtaining counsel (or, to put the matter differ-

[25] *See, e.g., Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F.2d 646, 660 (7th Cir. 1985); *Jones* v. *Central Soya Co.*, 748 F.2d 586, 592 (11th Cir. 1984). In addition, if the applicant agreed to pay some portion of the lodestar amount, regardless of outcome, the attorney has undertaken the case on a partially contingent basis, and the applicant cannot seek enhancement of any portion of the attorney's work that was not at risk. *See, e.g., Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 686 (N.D. Cal. 1974).

ently, whether the attorney was capable of mitigating the risk of nonpayment).[26]

Thus, applicants who had the financial wherewithal to pay for the services rendered, whether or not they in fact agreed to pay for them, will generally be unable to demonstrate that they could not have obtained legal counsel.[27] Similarly, applicants whose claims carried the potential for damage recoveries large enough to induce attorneys to take their cases on a percentage of recovery basis should have been able to attract competent counsel.[28] And in cases where the standard of liability is or approaches that of strict liability[29] so that, as a generic matter, the risk of failure—and thus of nonpayment—is insubstantial, applicants will not be able to demonstrate an inability to obtain competent counsel. In each of these situations, economic forces operating in the private market for legal services could be expected to ensure that the claimants secured representation. While such applicants remain eligible to recover attorney's fees in the amount of the lodestar (see *Venegas* v. *Mitchell*, 495 U.S. at 88), they ordinarily would not receive any enhancement of that figure.

Conversely, however, where applicants demonstrate that the factors outlined above are absent, they normally should be eligible for an award of enhanced fees if the

[26] If counsel can take reasonable steps to limit or mitigate the risk of nonpayment, the counsel presumably will be likely to accept the representation. Accordingly, Congress' fundamental purpose in enacting fee-shifting provisions will be served.

[27] A court's inquiry into this factor would be comparable to that which an attorney, faced with a client of modest but limited means, might undertake. Of course, the bar would be able effectively to assist the court in making such a determination.

[28] *See, e.g., Venegas* v. *Mitchell*, 495 U.S. 82 (1990).

[29] An example of such cases would be those brought to enforce effluent discharge limitations under the Clean Water Act. *See* U.S. Br. at 17 n.16.

relevant legal market generally would compensate for the risk of nonpayment. Such applicants have demonstrated that neither the generic nature of the case (*e.g.*, a strict liability claim), common economic arrangements (*e.g.*, a percentage-of-recovery contract), nor their own resources permitted the attorney to mitigate the risk of nonpayment. Because economic forces in the legal market would not normally attract counsel to the claims of these applicants based solely on the availability of a lodestar award, no further particularized inquiry into the plaintiff's actual difficulties in retaining counsel should be necessary.[30] Accordingly, the supposed evils of an actual difficulties test (see U.S. Br. at 18-23) need not arise.[31]

[30] The fact that the fee applicant, "by definition, . . . stands before the court with counsel" (*King* v. *Palmer*, 950 F.2d 771, 780 (D.C. Cir. 1991) (*en banc*), *petition for cert. filed*, Feb. 21, 1992, is neither fatal to, nor inconsistent with, a claim for a fee enhancement. In this case, counsel for respondents reasonably could have expected an enhancement given the law at the time the decision to represent respondents was made. If so, the availability of an enhancement would become the reason for eliminating enhancements generally, an obviously perverse result.

In addition, many applicants will be represented by attorneys whose motivations are non-economic. *See, e.g., Blum*, 465 U.S. at 892-96. Moreover, because fee-shifting provisions were designed to place contingent federal representation *as a whole* on the same economic footing as private fee-for-services representation, the relevant inquiry for fee enhancement purposes is not the individual attorney's assessment of the strength or weakness of a particular case, but the presence or absence of factors that, as a general rule, will induce or deter representation in the private market.

[31] These evils are thought to include penalizing defendants with the strongest cases, asking judges to decide whether they would have decided cases differently, and creating conflicts of interest between attorneys (who presumably will highlight the weaknesses of their cases for enhancement purposes) and clients. These concerns are exaggerated. The concern for "penalizing" defendants with strong cases rests on the unexamined assumption that a plaintiff's chances of prevailing are inversely proportional to the defendant's culpability. In fact, as most practitioners recognize, a host of

2. *The Extent To Which The Relevant Market Compensates For The Risk Of Nonpayment.*

Fee applicants who clear the substantial difficulties hurdle must then prove 1) that the relevant market compensates attorneys for assuming the risk of nonpayment and 2) the amount of such compensation. Contrary to the arguments advanced by petitioner's supporting *amici*, this inquiry does not pose insurmountable conceptual difficulties. In fact, determining the extent to which the relevant market compensates for the risk of nonpayment is conceptually no different than the "basic factual determinations" that underlie the calculation of the lodestar.

The United States argues that courts cannot determine whether the market compensates for risk of nonpayment by looking to the relevant market for the underlying claim (such as attorneys who handle Title VII or Clean Water Act cases), because these markets are almost entirely dependent on fee-shifting provisions for compensation. U.S. Br. at 20. Yet, courts routinely look to precisely these markets to establish the prevailing market rate for lodestar purposes. There is no logical basis for concluding that the hourly rates quoted by such attorneys reflect market forces but that the amount of enhancement

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factors such as burdens of proof, the availability of evidence, disparities in resources, and the complexity of underlying issues can all have a greater impact on the outcome of a case than the defendant's culpability; indeed, willful violations in which defendants seek to disguise their wrongdoing may be the most difficult to prove. Judges, moreover, can be trusted to recognize these practical difficulties and attorneys, who will receive nothing if they lose, can be trusted to try to overcome them.

In the ABA's view, an actual difficulties test, which requires an examination of the merits of the applicant's case, is improper because the purpose of enhancement is not to equalize prospective returns among different contingent cases with different degrees of merit, but to place federal contingent practice as a whole on the same economic footing as fee-for-services representation.

these attorneys require for assuming the risk of nonpayment does not. Moreover, courts can assess the propriety of enhancement claims by checking them against the prevailing practices of practitioners of comparable skill, reputation and experience in other private markets.

Nor is there any merit to the concern that, because fee applicants lack incentives to control costs, they will routinely agree to enhancements, thereby saddling defendants with unfair fees. The lack of cost controls is no more an attribute of enhancements than it is of any other aspect of attorney compensation under fee-shifting statutes. In calculating the lodestar, courts can and do routinely adjust both hourly rates and total hours to ensure that the fees losing defendants pay reflect the same degree of "billing judgment" that attorneys representing fee-paying clients would exercise. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 (1983).

Moreover, a fee applicant's failure to oppose fee agreements that include contingency enhancements (see U.S. Br. at 20-21) does not determine whether an enhancement should be awarded; rather, it is the absence or presence of objectively-verifiable factors that, in the private market, would govern a prospective litigant's ability to retain competent counsel that controls the availability of enhancement. Accordingly, there is no inherent danger that enhancements will become a "self-fulfilling prophecy" (*id.* at 21); courts are fully capable of preventing this problem.

Ultimately, the objections to market-based fee enhancements rest not on any theoretical or conceptual difficulties, but on an inherent distrust of the evidence used to prove such enhancements. Opponents of enhancements categorically dismiss affidavits proffered by attorneys in the relevant markets as "anecdotal in content and self-interested in motivation." States Br. at 17; see also U.S. Br. at 21 n.20 ("self-serving, *post hoc* affidavits"); *King* v. *Palmer*,

950 F.2d 771, 779 (D.C. Cir. 1991) (*en banc*) (affidavits "obviously self-interested"). Whatever may be said about the economic motivations of the successful counsel in a particular fee application, sweeping disparagements of entire sub-markets of the local bar simply cannot provide a proper basis for refusing to undertake the economic inquiry that fee-shifting provisions entail.[32] Defendants can proffer contrary evidence, in the form of affidavits or otherwise, or mount other challenges to the validity of a fee applicant's evidence. If such efforts fail, however, they should not be able to rebut an applicant's evidentiary showing on the theory that other officers of the court cannot be trusted to tell the truth in sworn statements.

Finally, this Court's ability to evaluate the judiciary's capacity to make fee enhancement determinations on the basis of reported cases is distorted because of the lack of clarity in the law concerning the availability of fee enhancements. Only by adopting standards akin to those proposed herein and allowing courts to apply them over a period of time can the Court meaningfully evaluate the ability of the judiciary to make fee enhancement judgments. But even if the practical problems asserted by petitioner and its *amici* were more plainly demonstrable, they would not provide a basis for this Court to interpret the term "reasonable" in a manner that guarantees that a form of compensation available to attorneys in the private market is categorically foreclosed to those who represent federal claimants. Instead, if the process is unmanageable, it is Congress, not this Court, that should

[32] This Court's decision in *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990), lends no support to blanket condemnations of attorney affidavits. In *Triplett*, this Court observed that an appellate court's reliance on the statements of three attorneys provided an insufficient basis upon which to declare a presumptively permissible federal regulatory scheme unconstitutional. *See id.* at 723-24. Moreover, in *Triplett*, there was considerable evidence, including statements by other attorneys, rebutting the substance of the three affidavits. *Id.* at 724.

modify the "reasonableness" standard. Absent congressional action, this Court should permit fee enhancement for contingent recovery to ensure that Congress' purpose of ensuring plaintiffs access to the courts for claims arising under statutes subject to fee-shifting provisions is fulfilled.

CONCLUSION

The holding of the court of appeals that fee-shifting statutes authorize a fee enhancement in appropriate circumstances should be affirmed.

Respectfully submitted,

TALBOT S. D'ALEMBERTE *
President
AMERICAN BAR ASSOCIATION
CARTER G. PHILLIPS
JOSEPH R. GUERRA
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215
Counsel for the
American Bar Association

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* Counsel of Record